ABSTRACT

Why do Supreme Court justices decide cases as they do? Is the context of the creation of the U.S. Constitution relevant to how we should interpret it? How are conceptions of judicial excellence changed and maintained? These questions and others are addressed in this compendium of essays, grouped loosely around the concept of “reasonableness.”

“Reasonableness” is an important but under-studied concept in the evaluation of the U.S. Supreme Court. Some research on the Court has sought to explain judicial outcomes by measuring the attitudes of the members of the Court; other research has shown how the strategic incentives of the Court lead it to act a certain way. My research focuses on the background norms which discriminate between reasonable and unreasonable arguments – the implicit but shared rules which indicate which arguments should be taken seriously and which can be ignored.

In the first chapter I show how certain views about “feeble-minded” persons, together with a robust view of the “police powers” of the state, worked together to produce Buck v. Bell, a case in which the Court upheld forced sterilization for persons with mental disabilities. Recent scholarship has argued that Buck was an outlier in a society that was moving away from eugenics; I show that Buck drew significantly from the standards of reasonableness of the time.

In the second chapter I address a normative problem: how should we interpret the meaning of the text of the U.S. Constitution? I argue that the meaning of the text must be understood from within the legal, social, and political context in which it was created. This contextual information shows what the law accomplished and what grant of authority was created when the Constitution was ratified.
In the third chapter I evaluate how Chief Justice Earl Warren’s performance as a justice changed the standards by which Supreme Court justices are evaluated. I argue that Warren’s tenure led to a revaluation of what aspects of judging are considered most important: after Warren, getting the right results became central and reliance on text, doctrine, and history would become less important.
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Introduction: Reasonableness and Law

“Reasonableness” is an important but insufficiently understood concept in U.S. Supreme Court studies. By “reasonableness,” I refer to the fact that certain arguments or reasons are perceived by members of the Court (and those who interact with it) as having weight or relevance. Broadly speaking, reasonable arguments are those arguments which are considered persuasive enough by members of a social group to enable their users to wield power. Though not all members of a social group share exactly the same views about which ideas or reasons are the most important, there are subtle and unspoken rules about which kinds of arguments are legitimate and which are not, about which are persuasive and which are crazy. Because such rules are shared by a group they can be observed, articulated, and described. This dissertation is a preliminary investigation into how the concept of reasonableness applies to certain aspects of the practice of the U.S. Supreme Court and the evaluation of judicial performance. I also include a prescriptive section on how the U.S. Constitution should be interpreted, focusing on the theoretical question of how much of the social “background” of the Constitution’s creation should be relevant for interpreters.

Why is an accurate account of reasonableness important for our understanding of the U.S. Supreme Court? Simply put, because the Court’s actions are influenced by what counts as a good reason in within the legal profession and American society. The Court is both enabled and constrained by the set of arguments which are at its disposal to decide cases. It is enabled because the existence of a set of “legitimate” arguments or reasons (that is, arguments or reasons which the relevant audience perceives as legitimate) allows it to take actions which others will recognize as authoritative. Utilizing such reasons allows the Court to wield power. However, the
Court is constrained by such norms because departing from them too much leads others to disregard its actions or challenge its authority.

In chapter one I give some general remarks about “reasonableness,” but in this dissertation I do not advance a general theory of how reasonableness affects the practice of the Court. Rather, I focus on a few important problems that illuminate how reasonableness is relevant to our understanding of the Court. The content of this dissertation divides into three related but independent sections:

**Investigating Reasonableness: *Buck v. Bell***

In chapter one I detail how certain “norms of reasonableness” influenced the outcome of *Buck v. Bell*, a notorious Supreme Court case which ruled that “feeble-minded” and other persons could be forcibly sterilized. I articulate the web of reasoning which made the outcome of the case seem plausible and justified in the eyes of the Court and much of the American public. Previous scholarship held that the eugenics movement at the time of *Buck* was “was, if not dead yet, very weak.”\(^1\) I grant that many scientists and other elites were leaving the eugenics movement by the mid 1920’s; however, I contend that the reasons in favor of forced sterilization were still widely believed to be credible, and that this credibility was a factor in why the Court decided the case as it did in 1927.

I argue that a few prominent beliefs, widely if not universally held in American society, made it likely that this case would be decided as it was: first, the view that feeble-mindedness was heritable. The contours of this belief in the public and professional mind varied somewhat over time. In the 1910’s there was widespread conviction that feeble-mindedness and other traits were passed from parents to children in a law-like fashion, and that patterns of inheritance could

\(^1\) Paul Lombardo, *Three Generations, No Imbeciles: Eugenics, the Supreme Court, and Buck v. Bell* (Baltimore: John Hopkins University Press, 2008), xii.
(in principle) be predicted with precision. This view had come under assault by the 1920’s, but the view that many (and perhaps most) cases of feeble-mindedness were due to inheritance remained strong at the time Buck was handed down.² Second, there was a widespread belief that feeble-minded persons were inclined toward crime, vice, prostitution, alcoholism, and so on. In the 1910’s it seemed to many that feeble-minded persons were almost certainly inclined towards immorality/criminality, but by the 1920’s the view seemed to be that feeble-minded persons were corrupted very easily, and thus at “high risk” for falling into a depraved life. In any event, the connection between feeble-mindedness and deviance had not disappeared by 1927. Lastly, I argue that the police powers jurisprudence of the time made the outcome of this case more likely than it otherwise would have been. Under this power state and local governments could pass laws to promote public health, safety, and morality, all of which (it was argued) were advanced by preventing the birth of “defective” offspring.

Eight cases in lower courts dealt with sterilization statutes prior to the Supreme Court’s ruling, and I discuss these cases in detail. Several of these cases struck down the sterilization statute in question, but I show how even these do not challenge the central assumptions which made eugenics plausible, and some even manifest sympathies for sterilization of feeble-minded persons as they strike down sterilization statutes.

Ultimately, it is difficult to say with precision how much the “norms of reasonableness” I discuss affected the outcome of the case. The idiosyncrasies of the individual justices and the particular circumstances of the case certainly affected the decision. However, it is noteworthy that when the Court decided the case, it received almost no criticism for its holding or logic – not from the press, not from the legal community, and not from the professional medical community.

² See p. 27, infra.
The case was either celebrated or reported without significant commentary. In a word, it seemed “reasonable” to much of the elite and popular culture. That a case which would be universally condemned in only a few short decades later could pass without virtually any criticism shows the “plausibility gap” between the reasoning of the second half of the 20th century and that of the 1920’s – what was considered sound reasoning in 1927 was considered completely implausible only a few years later. An adequate description of why *Buck v. Bell* was decided as it was must take account of the way that the norms of reasonableness structured and suggested a particular outcome to the case.

**Reasonableness and Interpretation**

In the second chapter, “Getting Into Mischief: On What it Means to Appeal to the U.S. Constitution,” I make an argument about how to discern the authority which is granted when “the People” (or more broadly, legislators) explicitly agree to make proposed legislation law at a particular moment of time. Initially this paper may not seem directly related to the concept of reasonableness, but in fact it is. I argue that in order to understand the meaning of a law one must know not only the “speaker’s meaning” or the “semantic meaning” of the words of the law but also have an understanding of the social, legal, and political background that the law enters into and modifies. Such contextual factors are *constitutive* of the meaning of the law; one cannot know the meaning of the law without knowing how it fits into the legal and political status quo.

In this chapter I seek to rehabilitate and elaborate the so-called “mischief rule” of English law. This rule of interpretation holds that interpreters should seek to discern the prior state of the law, the problem (or “mischief”) which prompted the legislators to act, and the remedy the legislators chose to fix the problem. This approach does the best job of identifying the legally

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3 P. 45-7, *infra*.
relevant meaning of law due to several features of law that I discuss: laws are made at particular moments of time, by persons with authority, using words, for the purpose of resolving political and moral controversies about how the state (and people within the state) should act. The theory of interpretation I advance is not a full theory of adjudication, that is, a theory about how judges or others should resolve legal controversies. Rather, it is a theory of the meaning of the grant of authority created when the people create a new law at a discrete moment of time. An appropriate understanding of such authority is an important part of a theory of adjudication, but a full theory of adjudication would include additional considerations.

In this chapter I evaluate and critique two rival views concerning the meaning of legal texts. I first engage a view which I call “Semantic Intentionalism,” the proponents of which argue that the meaning of a word or sign is whatever its authors intended to communicate when they spoke/wrote/created it. According to this view, speakers (or writers) may wish to make their meanings clear by using words in conventional ways, but “speaker’s meaning” (what the speaker intends) is always prior to and constitutive of “utterance meaning” (what the words would mean according to certain conventional norms); indeed, “utterance meaning” becomes a meaningless interpretive category for this approach. I criticize this view for not sufficiently taking account of the way we share a language and the fact that many legal intentions are not specifically semantic.

Gideon Rosen makes the point with regards to contract law: “When courts and commentators invoke the personal meanings of the parties [to a contract], they are not referring to anything specifically semantic or linguistic at all, but rather to the legal intentions and expectations of the parties – their intentions to change the legal score in certain ways by means of the contract in
question.” I expand this view to legal interpretation in general. The intentional acts which bring new laws into being (e.g., legislators voting for a law) may not be accompanied by specific semantic intentions about the meaning of the words of the law. What meaning, then, should we attribute to the words of the law? Not what the specific authors of the legislation (a problematic category in itself) had in mind when they wrote it, but what a reasonable person, acquainted with the legal and political context, would understand the law to be *accomplishing* when it is passed. This is the legally relevant utterance meaning of the law, which, of course, depends on a prior understanding of the legal and political background at the time of the law’s creation.

I also critique Jack Balkin’s account of “Living Originalism.” According to Balkin, there are two main phases of Constitutional interpretation. First, interpreters should seek to “ascertain the meaning” of the words of the Constitution. The relevant meaning for Balkin here is what he calls “semantic meaning,” which is basically the meaning of the words according to dictionaries at the time those words were added to the Constitution. However, according to Balkin, the semantic meaning of certain important portions of the Constitution, such as “due process of law” and “equal protection of the laws,” do not point to a single policy outcome; they instantiate principles which should inform government action. This leads to the second phase of interpretation: “constitutional construction.” In the construction phase interpreters follow the principles included in the constitution but have relatively broad leeway to determine what the principles mean for us today. There are no uniquely correct answers to the “meaning” of the Constitution at this phase, though there are better and worse ones. Each person can draw from a

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⁵ P. 71, infra.
wide range of sources of authority (such as tradition, doctrine, prudence, history, etc.) to make his or her case about what the Constitution really means.

Balkin qualifies his account of “semantic meaning” in many important ways, and it may be the case that a sufficiently qualified concept of semantic meaning would not disagree significantly with my own view of textual meaning. However, Balkin seems to bias the interpretive exercise towards finding authority-granting passages by the way defines categories of meaning. “Purposes or functions,” one of Balkin’s categories of meaning, do not form part of the meaning which interpreters are bound to follow - they are not relevant at the “ascertainment of meaning” stage. However, it is not possible to know the legally relevant meaning of a text without knowing why it was put there – what “mischief” was it meant to solve? Without knowing the reasons for which the law was created, particular phrases are likely to be read much more broadly than they should be. They will be used in a way that goes beyond the grant of authority that was originally given when the text was created.

After reviewing and critiquing these alternative views in detail, I shift to my own view, the modified mischief view. This view gets its name from Heydon’s Case, decided in 1584. In this case Lord Coke instructed interpreters to look at the prior state of the law, the problem (or “mischief”) which prompted the legislature to act, and the remedy the legislature chose to fix the problem. I believe Coke’s central insight is to interpret laws in accordance with what people understood the law to be accomplishing when it was passed – how did it change the legal and political status quo? Who was empowered to act, and what was the character of that empowerment? How far did the grant of authority extend?

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These questions, and others like them, help focus our attention on the contextual meaning the law rather than on what particular words mean according to a dictionary or the intentions of the particular persons who wrote the text. Such a focus is necessary because the dictionary definition of a word, divorced from its original context, does not tell us the practical import of the law – it does not tell us how the law changed the existing structures of government or how far its authority extends. By focusing on the problems the law was intended to solve and the remedies chosen to resolve those problems, the Mischief View does the best job of articulating the grant of authority created when the people enact a new law at a discrete moment of time.

Judicial Excellence After Earl Warren

In the final chapter I investigate how conceptions of good judging changed due to the tenure of Chief Justice Earl Warren. As with chapter one, I seek to describe a shared practice of understanding that is relevant to the activity of the U.S. Supreme Court. Standards of judicial excellence are shared by the community of those who interact with, serve on, or observe the Court. The list of relevant standards is long (and some are in conflict with each other), but at any given time some standards are seen as more important than others. These standards do not arise out of nowhere but develop in response to specific historical and political circumstances.

Chief Justice Warren and the Warren Court instigated a recalibration of which values were seen as truly important for justices to instantiate. After Warren judicial statesmanship and getting the right answers became relatively more important in the evaluation of judicial performance. On the other hand, craftsmanship, adherence to precedent, and reliance on history and text were all devalued to some extent. However, the practical ramifications of Warren’s tenure are difficult to gauge because he inspired not only a following but a resistance. Judicial conservatism defined itself against the record of the Warren Court (as well as the continued
activism of the Burger Court), and the impact of this counter-movement has also had an effect on the evaluation of judicial performance.

For the most part, both Warren’s supporters and detractors see him as not caring much for legal technicalities and using the law to get whatever results he wanted. The point of this chapter is not so much to argue that Warren was or was not “lawless,” but rather, that the general perception of Warren as lawless has important consequences for the evaluation of judicial excellence. In surveys of judicial excellence Warren is consistently rated as one of the best justices ever, often coming in behind only John Marshall and Oliver Wendell Holmes, Jr. Such a positive view of a justice who is also perceived as not caring for history, text, or precedent cannot but have an impact on the way such sources of judicial authority are evaluated. The results Warren achieved were perceived as so self-evidently right that the path by which he reached them seemed minimally important. Bernard Schwartz, a Warren admirer, makes the point perhaps better than he intended: “Perhaps the Brown opinion did not articulate in as erudite a manner as it should have the juristic bases of its decision. But the Warren opinion in that case is so plainly right in its conclusion that segregation denies equality, that one wonders whether learned labor in spelling out the obvious was really necessary.” Other admirers of Warren refer to his decisions as “anti-historical” and “anti-doctrinal.” That excellent judging could be seen as compatible with such labels suggests an important shift in what it means to be a good justice.

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8 P. 91-2, infra.
10 P. 100-2, infra.
Conclusion

It hardly needs emphasizing that the set of “reasonable” arguments at the disposal of the Supreme Court justices has changed dramatically over time. As certain points of U.S. history the view that blacks were mentally and socially inferior was considered “reasonable;”11 at other points, such views became the epitome of “unreasonableness.”12 The norms of reasonableness which impinge upon the Court will continue to change, and with them the possibilities of the Court. An understanding of the Court’s activities and decisions cannot be complete without an accurate description of the norms of reasonableness which structure and constrain the actions of the Court. With that in mind, let’s now turn to an investigation of *Reasonableness and the U.S. Supreme Court.*

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12 Among others, see *Loving v. Virginia*, 388 U.S. 1 (1967).
Chapter 1: Norms of Reasonableness and the Explanation of *Buck v. Bell*\(^1\)

In the words of the U.S. Supreme Court, Carrie Buck was “a feeble-minded white woman” who was “the daughter of a feeble-minded mother” and “the mother of an illegitimate feeble-minded child.”\(^2\) Due to this alleged family history of feeble-mindedness and other factors, Ms. Buck was forcibly sterilized in the Virginia State Colony for Epileptics and Feeble-Minded on October 19, 1927,\(^3\) after the Court authorized the procedure. Buck was sterilized in the midst of a national movement to prevent “feeble-minded” persons, criminals, and other “defectives” from continuing their kind. Thirty-two states passed forcible sterilization laws of some kind between 1907 and 1937, and thirty of those states performed sterilizations.\(^4\) More than 60,000 people were sterilized under these laws.\(^5\)

The Supreme Court decision which decided Carrie Buck’s fate, *Buck v. Bell*, is rightly criticized on a variety of legal and moral grounds,\(^6\) but my question in this essay is one of explanation: *why* did the Court decide *Buck* as it did? What made this decision possible and, in the eyes of the Court, justified? And further, why was the decision considered so “reasonable” in its own time?

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1 I would like to thank Stephen Macedo, Paul Frymer, Robert George, Becky Paget, Jared Frost, Laurel Frost, Anna Frost, and the members of the Princeton Political Theory Graduate Research Seminar for insightful suggestions on various versions of this paper. Keith Whittington deserves special recognition for excellent comments on several drafts of the paper.


4 See chart in *ibid.*, 294.


In this paper I argue that the Court decided the *Buck* as it did is because of certain “norms of reasonableness” (a term I will define below) concerning persons with mental disabilities (the “feeble-minded”) and the role of the government’s police power to advance the common good, both of which were prevalent in the legal discussion of eugenics\(^7\) in early 20\(^{th}\) century America. My account counters the assertion made by Paul A. Lombardo, in his recent and very excellent treatment of *Buck*, that the national eugenics movement at the time of *Buck* “was, if not dead yet, very weak.”\(^8\) I show that the argumentative resources at the disposal of eugenics supporters were anything but “weak;” the reasons for forced sterilization were considered plausible and compelling by many people. Though the norms of reasonableness I select are not the only factors which led *Buck* to being decided as it was, I contend that they strongly influenced the case, and made it more likely that the Court would come down on the side of forced sterilization.

I begin the paper with a definition of “norms of reasonableness” and then make an argument about what it means to “explain” a case, drawing on recent scholarship in the so-called New Historical Institutionalism movement of public law and the philosophy of social science. I argue that an approach that seeks to identify “norms of reasonableness” has explanatory power,

\(^7\) “Eugenics” is an umbrella term which includes anything which promotes a better human race. In this paper I use the term to refer specifically to forced-sterilization laws, a rather dramatic (but prevalent) method of “improving” the human race.

\(^8\) Lombardo, *Three Generations*, xii. Leading up to this quotation, Lombardo writes: “In retrospect, it would be reasonable to conclude that the result in *Buck* was inevitable. In fact, the very opposite was true. Carrie Buck was the victim of a very elaborate campaign to win judicial approval for eugenic sterilization laws, but the campaign need not have succeeded. For almost twenty years before the trial, scientists and policymakers had debated the tenets of eugenics – the ‘science of good breeding’ . . . . By 1924 the brightest minds in the new field of genetics were turning their backs on the simple-minded conclusions of those who championed eugenic sterilization, and their criticisms were far from secret.” I can agree that “the brightest minds” (i.e., those who would be vindicated by history) were turning away from eugenics, and I can agree that there was significant criticism of the eugenics movement. I can also agree that *Buck* need not have come down as it did. However, I disagree that the movement “was, if not dead, very weak,” by all relevant measures. Whether a movement is “dead” is not measured only by whether the brightest minds agree with it, but by whether the relevant sources of power in a society are or are not aligned with it. The norms of reasonableness which framed the discussion still gave a great deal of power to supporters of eugenics and made the eventual outcome of *Buck* very “reasonable,” at least to many observers. It is telling, as I note below, that Lombardo grants that the “Press reaction [to *Buck*] was overwhelmingly positive.” Lombardo 174.
but that this power is distinct from the kind of explanatory power inherent in social scientific approaches which attempt to demonstrate causal necessity. I then show why it mattered, for *Buck*, that there were particular norms of reasonableness about persons with mental disabilities and the role of the “police power” of the state in early 20th century America. I review materials from the broader culture and analyze the complete set of state and lower federal court cases which dealt with forced sterilization prior to *Buck*. I show that even though a majority of cases struck down eugenics statutes, none of them questioned the widely-believed connections between feeble-mindedness and crime, immorality, and other social problems. These connections, combined with the state’s police power authority to protect and promote public health, safety, and morality, provided a favorable context for a decision such as *Buck*. To many, forced-sterilization seemed like a reasonable response to a large (and potentially growing) threat to public well-being.

### Explaining Legal Outcomes

My notion of a “norm of reasonableness” draws on insights from Martin Heidegger and Ludwig Wittgenstein as elaborated by and extended in the thought of contemporary theorists such as Charles Taylor, Alasdair MacIntyre, and John Searle.9 In one way or another, all of these

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9 Martin Heidegger, *Being and Time*, trans. John Macquarrie and Edward Robinson (New York: Harper and Row, 1962), especially Division I chapters 2-5. For useful commentaries see Hubert Dreyfus, *Being-in-the-World* (Cambridge: MIT Press, 1991) and Mark Wrathall, *How to Read Heidegger* (New York: W.W. Norton and Co., 2005), especially chapter 2. Ludwig Wittgenstein, *Philosophical Investigations*, trans. G.E.M. Anscombe (Oxford: Blackwell, 2001). Though Wittgenstein only occasionally uses tantalizing phrase “life-form” or “form of life,” his later work clearly presupposes such a concept throughout as he articulates his view of language. For example, in section 23 of *Philosophical Investigations* he states that “The speaking of a language is part of an activity, or of a life-form,” and goes on to list a variety of “language games” that can be played as a part of a particular life form. But, not all usages of language are possible within every life-form because not all forms of life are open to the possibility of such uses. See also sections 19 and 241. Charles Taylor, *Sources of the Self* (Cambridge: Harvard University Press, 1989) explicitly sets out to articulate the “background” of many of our spiritual and moral intuitions: “I want to bring out and examine the richer background languages in which we set the basis and point of the moral obligations we acknowledge. More broadly, I want to explore the background picture of our spiritual nature and predicament which lies behind some of the moral and spiritual intuitions of our contemporaries” (p. 3). This focus
thinkers emphasize the importance of the “background” of attributes, conditions, capacities, and practical know-how which make human thought and action possible. This background, which is largely unnoticed in our day-to-day affairs, includes an incredibly dense and interconnected “imagination” of socially constructed symbols (including language), memories, social roles, values, institutions, patterns of behavior, styles of being, and so forth, which enable and constrain the possibilities humans have for thought, action, and being. Relevant portions of this background are largely shared by members of a particular society and are constitutive of our shared social life and deliberative practices.

Because such deliberative practices are public, they can be investigated and described. The understandings and expectations which constitute norms of reasonableness are rarely stated explicitly; rather, they are disclosed or revealed in the way that people perform their role-dependent functions and how others respond to what they do. The law is a particularly fruitful area to investigate norms of reasonableness because lawyers, judges, and other legal actors are expected and required to give reasons for their actions as a part of their official duties. The norms of reasonableness which structure the limits of judicial possibility are shown the way that certain

on the background is characteristic of his work more broadly. See also A Secular Age (Cambridge: Harvard University Press, 2007); “Irreducibly Social Goods,” in Philosophical Arguments (Cambridge: Harvard University Press, 1995); essays in Philosophy and the Human Sciences and Human Agency and Language (Cambridge: Cambridge University Press, 1985). Alasdair MacIntyre, After Virtue: A Study in Moral Theory (Notre Dame: Notre Dame Press, 2007 [1981]). Searle uses the terms “background” and “network” in technical senses to mean, respectively, pre-intentional “capacities, abilities, and general know-how” and an interconnected set of intentional states which determine the “conditions of satisfaction” for intentional acts. However, the categories are not airtight; at times Searle says the network is part of the background, but still wants to hold onto the distinction. See John Searle, Mind: A Brief Introduction (Oxford: Oxford University Press, 2004), 172-4; Rationality in Action (Cambridge: MIT Press, 2001), 57-8; The Rediscovery of the Mind (Cambridge: MIT Press, 1992), chapter 8. My use of the term “background” is more like what Searle would call the “network,” though I recognize the interdependence of the two.

Taylor’s use of the term “social imaginaries” has gained traction in some quarters. By it he means “something much broader and deeper than the intellectual schemes people may entertain when they think about social reality in a disengaged mode. I am thinking, rather, of the ways people imagine their social existence, how they fit together with others, how things go on between them and their fellows, the expectations that are normally met, and the deeper normative notions and images that underlie these expectations.” See Charles Taylor, Modern Social Imaginaries (Durham: Duke University Press, 2004), 23.
kinds of reasons are criticized (what, exactly, is wrong with the reasoning?), esteemed (which reasons are endorsed by the highest courts?), or ignored (which reasons are irrelevant to the conversation?).

I reiterate that I intend to investigate norms of reasonableness as matters of social fact, that is, aspects of an ongoing, empirically verifiable practice of reason-giving and –taking. I use “reasonable” and “norms of reasonableness” in a sociological sense, to refer to what people understand and accept as good reasoning around here, at a particular point in time. It follows that the reasoning which judges and others accept as reasonable need not be “reasonable” in the sense of “true” – there is no shortage of norms of reasonableness which historical (and current) persons have treated as good and true, even though they are gravely evil and false. Further, I am quick to concede that the practice of reason-giving and –taking in American law (both now and in the past) is not monolithic but is constituted by a plurality of “legitimate” forms of argumentation.\(^{11}\) Sometimes the forms of legitimate argumentation are in direct conflict with each other. However, the extent to which there are a plurality of legitimate reasons, and the extent to which they are seen to conflict with one another, is also a matter of social fact – we can discern this by how people (especially people in power\(^{12}\)) speak and act; by which arguments they take seriously and which they deem to be trivial.

My central descriptive social-scientific claim is that identifying norms of reasonableness aids us in the explanation of cases. In other words, what judges (and others connected to the judicial profession) regard as good reasoning affects the legal decisions that judges can and do

\(^{11}\) See Philip Bobbitt, Constitutional Fate (Oxford: Oxford University Press, 1982), chapters 2-7, for various “modalities” of Constitutional argumentation.

\(^{12}\) As Michel Foucault would point out, it’s not the opinion of just any American that counts, but rather those with the relevant power. It is the understandings and expectations of people in power that count, rather than those of the “average” person.
make. The explanation of many cases (such as, in my view, *Buck v. Bell*) would be incomplete without an articulation of the norms of reasonableness which held sway over the legal community and broader culture and which partially determined the outcome of the case.

However, the notion of *causal necessity* (i.e., that the presence of certain variables under like circumstances necessarily produces a particular set of outcomes), currently dominant in descriptive social science, seems inappropriate to investigate norms of reasonableness for a variety of reasons: first, dividing norms of reasonableness into discrete and mutually exclusive categories (so they can be “tested” against each other) will be difficult if not impossible because norms of reasonableness are interconnected in a “network” and sustain each other in a holistic fashion. 13 The lines between feeble-mindedness, morality, race, and class are all blurry in the United States in the early 20th century; because of this, separating them sharply from one another is both difficult and descriptively inaccurate, since the meaning of each factor is its place within the overall world of those involved in the practice. Second, because norms of reasonableness are a part of the “background” they often regulate controversies by keeping certain matters out of the legal conversation altogether. Certain arguments or kinds of reasons are so “off the wall” in particular historical moments that it is hard to get any judge or legal official to take them seriously; consequently, the evidence for such norms is often found both in what judges say and in what can be inferred from what they don’t say. 14 Third, for many particular areas of law, the notion of a “representative sample” of cases from which we could draw inferences common to all seems complicated at best or hopeless at worst. It also seems inappropriate, for judges have a sense for what constitutes a good legal argument *before* they have reviewed scores of cases in a particular area of law. Norms of reasonableness inform the way judges think about, handle, and

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13 See *supra* note 8.
discuss cases, not just the way they decide them. Fourth, the existence of norms of reasonableness is inferred by actions and dialectical exchanges between particular persons at particular times. Such interactions are illuminating because they show what (supposedly) smart and powerful people thought the most convincing reasons for their positions were; further, they show what issues the sides in the debate thought were relevant or significant for deciding the question. But evidence such as this is difficult to code across arguments and debates because the particular contexts can have such a strong bearing on what the parties discuss. In the law, differences of fact or slight differences in the wording of state laws can make great differences in how a case is discussed and decided.

Further, inasmuch as an inquiry into norms of reasonableness tries to describe the relative weight and importance of particular reasons as understood by the people involved in the practice, it must give central place to the perspective of those people involved in practice itself. Therefore, we must adopt something like what H.L.A. Hart called the “internal perspective of the law,” that is, the perspective of those who inhabit the practice and recognize as reasons the considerations which are relevant to that practice. Judges understand themselves to deliberate in a genuine sense, that is, they listen to arguments on both sides of a legal controversy and then choose that outcome which seems most reasonable or right. Causal necessity makes genuine deliberation incoherent.

But if an “explanation” is not based in causal necessity, is it an explanation at all? Some may think not, but I hold that explanations need not attempt to show causation in a narrow sense in order to be useful or compelling. Articulating the norms of reasonableness which were prevalent in a particular legal culture answers the “why?” of social science in a particular way:

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not by positing an efficient cause for the action of an actor, or by showing an idealized structure of incentives in which the judge necessarily operated, but by providing the background within which the judge could think and argue. Such an approach takes human agency seriously, while acknowledging that it is not completely unconstrained. Background norms of reasonableness “suggest,” though they do not demand, that an actor act as he does, and in that sense articulating such norms constitutes an answer to why judges act as they do.

Scholars within what is called the “New Historical Institutionalism” (NHI) movement in public law have also become jaded by explanatory approaches modeled on the natural sciences, such as the “attitudinalist” approach exemplified in Jeffrey Segal and Harold Spaeth’s The Supreme Court and the Attitudinal Model. Despite the undisputed (if limited) predictive and explanatory power of these approaches, many scholars have been dissatisfied with what they see as the deficiencies inherent in such a research agenda. Specifically, scholars have faulted attitudinalist and strategic models for ignoring the ongoing role of political and social institutions; for not appreciating the role of justification in judicial practice; and for and for not having an account of why judges have the policy preferences that they do. Speaking of these and other criticisms, Keith Whittington writes: “By taking judicial preferences as given, the attitudinalists place in the background much of what formed the status quo more generally. The systematic intellectual and material processes that restrict the range of possible judicial outcomes are ignored. The attitudinalist model tells us a great deal about how a given justice is likely to

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18 Gillman and Clayton, The Supreme Court in American Politics, 2, 4, and 1.
vote in a case that raises particular issues, but it tells us little about how such cases arose, how those issues had been framed, and why the justices approach their task in these ways.”

Scholars who identify with NHI stress the importance of describing and explaining the way judges think and reason. Thus, in the quotation above Whittington speaks of “systematic intellectual . . . processes” and elsewhere in the paper argues for the importance of showing the “cognitive maps that shape how the justices approach a given case and imagine the available choices.”

Howard Gillman and Cornell Clayton, in an introduction to an important compilation of NHI essays, note that research within this movement “resists the behavioral tendency to reduce courts to individual, quantifiable units of analysis and instead seeks to emphasize the cognitive structures that attach courts and judges in general to culture and society.” They go on to highlight that the essays in that volume show “the role that institutional structures play in motivating and giving direction to judicial behavior through conditioning the judicial mind to a sense of what is appropriate for a judge, proper for a court, or normatively justifiable as a matter of law.”

“Judicial mind,” “cognitive maps,” “cognitive structures,” and “systematic intellectual processes” are all on the NHI agenda, but that are these terms seeking to describe? I think many of the intuitions which underlie these terms can be cashed out in terms of background norms of reasonableness, without making it sound like all of the action is in the judge’s head. As these and other scholars note, it is the shared practices of reasoning and socialization which lead to a culture where certain legal outcomes become more likely as a matter of social fact.

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20 Ibid.
22 Ibid., 5.
The Menace of the Feeble-Minded

My explanation of Buck begins with the place of the “feeble-minded” people in America in the decades leading up to 1927. It will not be necessary to give a detailed review of the social and economic conditions which prevailed in America in the early 20th century, but we should note the increased emphasis on science, rationality, and efficiency which were part of many of the reform movements of the Progressive era. Disciples of the “cult of efficiency”23 sought to apply rationalistic methods to aspects of social life as diverse as factory work, legal process, and human reproduction.24 Eugenics, one of the many reform movements of the time, sought to improve the condition of the human “stock” through encouraging the right kinds of people to marry and produce offspring, and discouraging “defective” and criminal classes from doing so.

Sir Francis Galton, the “father” of modern eugenics, had been advocating something like the eugenics project since the 1860’s and coined the term “eugenics” in 1883.25 Galton believed that by “careful selection . . . it would be quite practicable to produce a highly-gifted race of men” in a few short generations.26 Galton developed various mathematical tools to explain and predict inheritance, but eugenics did not become widely accepted until the heredity studies of Gregor Mendel were rediscovered in 1900. Mendel’s studies showed that certain traits (such as the color or shape of pea plants) could be passed from one generation to the next in a predictable, law-like fashion.27 Very quickly, Mendel’s work came to dominate the biological discussion of

26 Galton, Hereditary Genius, 1.
27 When Gregor Mendel published “Experiments on Plant Hybridization” in 1865, it was largely overlooked. Beginning in about 1900, however, the work was rediscovered and became seminal in hereditary studies. See Lombardo, Three Generations, 30.
heredity in the United States: “The enthusiasm with which biologists-in the United States in particular-began to endorse the Mendelian scheme cannot be overemphasized. Here, for the first time, was what seemed to be a generalized, predictive, and experimentally verifiable concept of heredity that applied to all living forms, including human beings.”

Eugenicists postulated that many traits, including criminality, alcoholism, immorality, shiftlessness, and “feeble-mindedness,” could be passed from one generation to the next, and that such passing could be predicted with near-mathematical certainty.

Once the Mendelian approach to heredity was in place, the eugenics movement began to gain momentum in science, politics, and culture. In 1910 the Eugenics Records Office (ERO) was founded as a research center and clearing-house for eugenics literature, and other institutions would follow. Indiana passed the nation’s first sterilization legislation in 1907 and 17 more states would follow suit by 1919. Various religious organizations saw value in eugenics and began preaching it from their pulpits. Prominent figures in society endorsed eugenics and the idea seeped into popular culture.

Preceding and later merging with such thinking was the practical issue of what should be done with feeble-minded people. The “burden of the feeble-minded” seemed to present an ever-

29 The ERO had an impressively prestigious board of directors, including inventor Alexander Graham Bell, the first dean of the School of Medicine at John Hopkins, future Nobel Prize winner Thomas Morgan Hunt, and others. Some of these would later leave the movement. See Lombardo, Three Generations, chapter 3 and p. 56.
30 “Other groups also played an important role in the development of the American eugenics movement-groups such as the American Breeders’ Association (whose Eugenics and Immigration Committees were the first eugenics organizations in the country), the American Eugenics Society, the Eugenics Research Association, the Galton Society, the Institute of Family Relations, and the Race Betterment Foundation. The ERO, however, was the only major eugenics institution with a building, research facilities, and a paid staff.” Allen, “The Eugenics Records Office,” 227.
31 See Appendix C in Lombardo, Three Generations.
growing practical problem in the mid-to-late 19th and early 20th centuries. Schools and institutions designed specifically for the feeble-minded started springing up for the first time in this period, bearing names such as the “Virginia State Colony for Epileptics and Feeble-minded,” “Pennsylvania Training School for Feeble-Minded Children,” and “Custodial Asylum for Feeble-Minded Women,” (in Newark, New York).34 Early on, the goal of many such institutions was to educate and train feeble-minded persons so that they could be productive and semi-normal members of the community.35 However, by the late 1800’s, most professionals had abandoned the goal of “curing” feeble-mindedness and instead planned on permanent institutionalization.36 Accordingly, the number of persons housed in such institutions grew rapidly. In 1904, the total U.S. institutionalized population of feeble-minded persons was 14,347. This number grew to 20,731 in 1910 and jumped to nearly 43,000 by 1923.37 By 1936, the number had ballooned to nearly 81,000.38 Though some states housed more feeble-minded persons than others, the vast majority of states addressed the “burden” of the feeble-minded in one way or another. In 1924 there were 58 public and 80 private institutions for the feeble-minded nation-wide, and all but six of the 48 states could boast of having at least one.39

However, though the public was giving significant attention to the “feeble-minded” from the mid-nineteenth century on, the meaning of term “feeble-minded” was vague and imprecise.40 Explicit articulations of feeble-mindedness usually focused on an individual’s inability to care

34 Lombardo, Three Generations 14, 60; James W. Trent, Inventing the Feeble Mind (Berkeley: University of California Press, 1994), 15, 31
35 Trent, Inventing the Feeble Mind, 25-8.
36 Ibid., 85-95.
37 Ibid., 188.
38 Ibid., 199.
39 Ibid., 185.
for himself or function in society normally, or to compete on equal terms in society. Feeblemindedness probably included (in today’s terminology) those with many forms of mental retardation, autism, and pronounced learning disorders, as well as those who were abnormally “slow.” Those who were suspected of being immoral were also thought to be feeble-minded. The term was closely related to (and sometimes synonymous with) terms such as “idiot,” “imbecile,” “mentally deficient,” and “defective.” Notably, feeble-mindedness was distinct from “insanity” and “madness.”

In 1914 prominent American psychologist and eugenicist Henry H. Goddard attempted to give the concept of feeble-mindedness more scientific precision in his book *Feeble-Mindedness: Its Causes and Consequences*. This massive 600-page work was mainly a scientific defense of the idea that feeble-mindedness was an inheritable trait subject to Mendelian principles. Its treatment of feeble-mindedness is representative (in significant respects) of the treatment feeblemindedness then popular in academia, popular culture, and the courts, and some of Goddard’s research was introduced as evidence at the *Buck v. Bell* trial.

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41 See Lombardo, *Three Generations* 5, 15, and discussion of Goddard below.
42 *Ibid.*, 7, 27-8, 36, 96-7. A law review article in 1925 defined the difference between feeble-mindedness and insanity as follows: “A feeble-minded person is a mental dwarf, a person whose mind has never developed, sometimes because his ancestors are also under-developed mentally, sometimes because of disease, or of an accident at birth or in early childhood; but always he is a person with subnormal mentality. The insane person is in theory, at least, a person who has at one time enjoyed normal mentality, but who has, owing to disease or accident, lost it. Roughly, the distinction between the two is that between a person who never has a complete mind, and a person who does have one but loses it through the action of disease or accident.” See Burke Shartel, “Sterilization of Mental Defectives,” *American Law Review* 59 (1925): 841-63, 843.
44 Goddard became known to the public when he published *The Kallikak Family: A Study in the Heredity of Feeble-Mindedness* (New York: Macmillan, 1921 [1912]), a book which told the tale of two lines of descendants which came from a Revolutionary War soldier referred to as Martin Kallikak. Martin fathered one line of descendants via an indiscretion with a feeble-minded barmaid; the other line came from a marriage to a virtuous woman of good heredity. The child he sired with the barmaid led to generations of poverty, immorality, and feeblemindedness; the children from his marriage and their descendants were upstanding and prosperous citizens. Of the latter line, Goddard writes: “There have been no feeble-minded among them; no illegitimate children; no immoral women; only one man was sexually loose. There has been no epilepsy, no criminals, no keepers of houses of prostitution”
For our purposes, the most important part of the book is Goddard’s discussion of behaviors which could be expected from feeble-minded people. According to Goddard, feeblemindedness lent itself to many moral and social problems, often costly to society, of which Goddard listed the following: 1) “Crime.” Speaking of the feeble-minded, Goddard writes that “Those who are born without sufficient intelligence either to know right from wrong, or those, who if they know it, have not sufficient will-power and judgment to make themselves do the right and flee the wrong, will ever be a source of criminality.”\footnote{Goddard, Feeblemindedness, 7.} Goddard surveyed a list of “reformatories and institutions for delinquents” and concluded that probably “at least 50% of all criminals are mentally defective.” One institution reported that 89% of its inmates were mentally defective. 2) “Alcoholism.” Again, because the feeble-minded are both unintelligent and imprudent, they often become slaves to the drink: “Many of the feeble-minded have no control over their appetites or over the situation in which they are placed, and given an environment with temptation and suggestion to drink intoxicants, they easily yield.”\footnote{Ibid., 11.} 3) “Prostitution and the White Slave Traffic.” Morons were especially dangerous in this regard, as “they have normal or nearly normal instincts with no power of control.” A survey of 104 girls incarcerated for “immoral life” in a reformatory in Geneva, Illinois, found that fully 97% of them were feeble-minded. Goddard cautions us to avoid jumping to extreme conclusions based on one statistic, but states that “many competent judges estimate that 50% of prostitutes are feeble-minded.”\footnote{Ibid., 14-15.} 4) “Pauperism.” By this, Goddard means “a person who will not work sufficiently to earn his living, (p. 30). The book was a commercial success and went through many editions. This book was introduced as evidence in the trial of Carrie Buck. See Leila Zenderland, Measuring Minds: Henry Herbert Goddard and the Origins of American Intelligence Testing (Cambridge: Cambridge University Press, 1998), 324
- he is lazy and prefers to live at the expense of someone else."\textsuperscript{48} Goddard estimates that "at least 50\% of inmates at almshouses are feeble-minded."\textsuperscript{49} 5) "Ne’er-Do-Wells." These people, while not fitting into the categories listed above, "are still shiftless, incompetent, unsatisfactory and undesirable members of the community." They often receive support from others, and many of them are probably feeble-minded. Lastly, 6) "Truants." Some children avoid school because they "cannot succeed in school."\textsuperscript{50} One study showed that "upwards of 80\% of them are feeble-minded."\textsuperscript{51}

Goddard agreed with the mainstream practical solutions to the problem of feeble-mindedness, arguing that one of the best ways to deal with feeble-mindedness in the long term was to prevent feeble-minded people from reproducing. Goddard briefly discusses various methods of doing so, such as enacting laws which prohibit the feeble-minded from marrying, placing feeble-minded people in segregated state institutions, or perhaps sterilizing feeble-minded people generally.\textsuperscript{52}

How was Goddard’s work received? What was controversial, and what was not, about his work? Much of the response to \textit{Feeble-Mindedness} was positive. Writing in \textit{Science}, Charles Davenport (a prominent eugenicist, director of the ERO) said that "it will be everywhere regarded as a useful piece of work and one that everyone who is concerned with the troubles of human society will prize."\textsuperscript{53} A review published in the \textit{International Journal of Ethics} stated that "the force of such a study as this is compelling . . . the author is performing a high service by

\textsuperscript{48} \textit{Ibid.}, 15-16.
\textsuperscript{49} \textit{Ibid.}, 17.
\textsuperscript{50} \textit{Ibid.}, 18.
\textsuperscript{51} \textit{Ibid.}, 19.
\textsuperscript{52} For more on laws which prohibited the feeble-minded from marrying, see Matthew J. Lindsay, “Reproducing a Fit Citizenry: Dependency, Eugenics, and the Law of Marriage in the United States, 1860-1920,” \textit{Law and Social Inquiry} 23 (1998): 541-87.
these studies which are of importance to social workers, legislators, parents, and courts.” An author writing in *Annals of the American Academy of Political and Social Science* opined that Goddard’s book was “one of the most important volumes yet written on the subject.”

But not all readers were impressed. H.C. Stevens, Director of the Psychopathic Laboratory at the University of Chicago, argued that mental abilities are difficult to judge in adults and that the cursory field research conducted to support Goddard’s conclusions did not authorize Goddard to attribute mental ability to people in the way he did. Stevens also criticized Goddard for ignoring or minimizing evidence that feeble-mindedness could have other causes, and argued that feeble-mindedness could not be considered a “unit characteristic” subject to Mendelian principles.

Similar criticisms were brought against other eugenicists who argued that feeble-mindedness was inherited in a Mendelian fashion. When the above-mentioned Davenport published *The Feebly Inhibited* in 1915, it was also criticized for not taking due note of the way that mental characteristics are different from other characteristics: “In this age of hyper-enthusiasm some of our fellow-workers are inclined to let their theories and ideals loosen their hold on the facts . . . Some students approach the problem of the inheritance of mental traits fresh from the biological laboratory. Without hesitation they will assume, for example, that the overzealous care of one’s dress is a unit character, recessive to all appearances, acting in

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Mendelian ratio, similar to hair color in certain animals.\textsuperscript{57} Though he wanted to maintain that feeble-mindedness could be inherited, by 1926 Davenport conceded that feeble-mindedness might not be inheritable according to Mendelian laws.\textsuperscript{58}

Mendelian inheritance, then, was controversial in professional circles by the late-1910’s, but some version of the inheritability of feeble-mindedness persisted up through the time when \textit{Buck} was decided. In 1922 J.E. Wallace argued that feeble-mindedness could come from many different sources, the standard view by the 1920’s. However, Wallace and many others believed at least some cases of feeble-mindedness were due primarily to heredity. In a literature review he cited four papers which argued that feeble-mindedness is rarely or only very infrequently the cause of feeble-mindedness, but twenty-one papers or authorities which held that this condition is inherited in some definite percentage of cases (some estimates were upwards of 80%).\textsuperscript{59} In a 1926 paper given at the annual meeting of the American Association for the Study of Feeble-Minded, Abraham Myerson claimed that “there appears to be a distinct tendency for the inheritability of feeble-mindedness from feeble-minded parents alone, the trend being almost an incontrovertible one in the case of decent from two feeble-minded parents.”\textsuperscript{60} Not all professionals believed in the inheritability of feeble-mindedness, and those who did hedged their view with many qualifications; nevertheless, the view that feeble-mindedness was inherited in at least some circumstances persisted.

\textsuperscript{58} Charles Davenport, “The Nature of Hereditary Mental Defect,” \textit{Journal of Psycho-Asthenics} 31 (1926): 196-202, 202: “Concerning the specific question whether mental defect is inherited in a Mendelian fashion, I am free to confess that I think that the subject deserves further study.”
\textsuperscript{59} J.E. Wallace, “Causative Factors of Mental Inferiority and the Prevention of Degeneracy,” \textit{Journal of Psycho-Asthenics} 27 (1921-1922): 75-116, 96-9. Wallace’s own view was that “toxins,” especially alcohol, were to blame in many cases of feeble-mindedness.
\textsuperscript{60} Abraham Myerson, “Researches in Feeble-Mindedness,” \textit{Journal of Psycho-Asthenics} 31 (1926): 203-9, 205. Here he cites the conclusions of a collaborator, but also seems to endorse them.
And what of the view that feeble-mindedness was closely related to crime, alcoholism, prostitution, and the like? Was it still widely held at the time Buck was decided? To better understand where the professional community stood on this issue I surveyed the Journal of Psycho-Asthenics, the official journal of the American Association for the Study of Feeble-Mindedness, for the six years prior to the Buck decision. In articles from these years I found an evolving account of feeble-mindedness, but not one that was entirely dissimilar to the one given by Goddard. Certainly there was a greater recognition in the 1920’s that, as one author put it, the “feeble-minded person is not necessarily a potential criminal.”\textsuperscript{61} The view that feeble-mindedness and criminality went hand in hand was most widely believed in the mid-1910’s. Looking back in 1926, A. R. T. Wylie wrote that, “By 1914 it seemed that the feeble-minded were either potential criminals or prostitutes and that segregation with the aid of sterilization and marriage laws was [sic] the only means of control.”\textsuperscript{62} But, such a close connection between feeble-mindedness and social problems was no longer the consensus view. In his 1924 address as President of the American Association for the Study of Feeble-Mindedness, Walter E. Fernald spoke of the “Legend of the Feeble-minded,” by which he meant the standard view articulated by Goddard: that “the feeble-minded were almost all of the highly hereditary class; that they were almost invariably immoral,” and so on. Fernald’s own research, which was widely cited, showed that less than of 8\% of feeble-minded people studied in certain school clinics had “an indication of antisocial or troublesome behavior.”\textsuperscript{63}

However, the feeble-minded still presented a potential problem, at least in the eyes of some. In 1925 J.M. Murdoch gave voice to a new understanding of feeble-mindedness that was held by many. Murdoch believed that feeble-minded people are no more prone to crime or immorality than you or I: “The feeble-minded are just like other individuals, so are good and some are bad, largely depending upon the environment. Virtue or vice does not depend upon the degree of intelligence of the individual.” However, he also argued that the feeble-minded are corrupted very easily: “Being mere children in mentality but with bodies often fully developed, mental defectives are easily led astray and become tools of designing persons . . . Mental defectives are apt to develop bad habits, become dependents, prostitutes or other delinquents, or felons, involved in the most serious crimes, such as murder.” In other words, even though feeble-minded people aren’t inherently criminal, they can and do fall into crime and immorality very easily. The “burden of the feeble-minded” had not gone away.

In summary, by the time *Buck* was decided, there was significant controversy over exactly how feeble-mindedness was caused and whether it was closely related to the socially-burdensome tendencies listed by Goddard in 1914. However, that feeble-mindedness was inherited in at least some cases and that feeble-minded people had some special propensity toward crime remained prominent views within the professional community. Using the psychological vocabulary of the time with the accompanying concepts of criminality and other socially undesirable traits probably did not strike most Americans as wrong or even strange. This acceptance was not the product of individual meanness; rather, it was a feature of the publicly shared linguistic practices of the time. Early 20th century Americans knew that they could use these terms without ever having to worry about being criticized for being “insensitive,” “rude,”

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or anything else. Of course, knowing that you wouldn’t be criticized for using these terms and associations wasn’t a kind of “knowing” which was present at hand, constantly on one’s mind; it was implicit knowledge of how the norms of reasonableness functioned at the time. However, within the professional community and the general public, the “cultural adjacency” between feeble-mindedness and many social ills was unproblematic and secure.  

One final concept connected to feeble-mindedness is worth noting. In 1917 ex-president Theodore Roosevelt commented on “the unrestricted breeding of a feeble-minded, utterly shiftless and worthless family.” The final adjective of “worthless” was one we haven’t encountered thus far, but it was actually standard practice to talk of the feeble-minded this way. Dr. Alfred Priddy, superintendent of the Virginia State Colony of Epileptics and Feeble-Minded at the time Carrie Buck was incarcerated, spoke of her family as belonging to the “shiftless, ignorant, and worthless class of antisocial whites of the South.” Testifying before Congress on an immigration bill, eugenicist Harry Laughlin spoke of “worthless, mentally backward” families. The fact that “worthless” could be used so easily in connection with “feeble-minded” showed the kind of social standing which people labeled by this term had. Not only were the feeble-minded costly to society, they were also worthless.

Feeble-mindedness and Sterilization in Court

Though brief, I hope the foregoing has given some context for how Americans in the early 20th century talked and thought about feeble-minded people. We now shift our attention to

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65 Michael Freeden, “Political Concepts and Ideological Morphology,” Journal of Political Philosophy 2 (1994): 140-164. Freeden usefully distinguishes between “logical adjacency,” or concepts which are related to each other in virtue of the content of the concepts, and “cultural adjacency,” or concepts which are related to each other in virtue of the history and culture of a people.
67 Quoted in Lombardo, Three Generations, 138.
68 Ibid.
legal battles over particular sterilization laws, which, I will show, share many features with the extra-legal discussion. Between 1912 and 1927 there were nine cases in which a sterilization statute was challenged in some American court. The highest courts which heard these individual cases were the U.S. Supreme Court (1), federal district courts (2), state supreme courts (5), and a lower state court (1). A detailed review of each of these cases would be tedious and undesirable; rather, moving chronologically, I will select broad themes which emerge from the cases to illustrate the structure of the norms of reasonableness at the time. The diversity of the laws that were challenged, as well as the circumstances of the suits, makes generalization difficult. However, I will show that in not a single legal dispute leading up to *Buck* were the norms of reasonableness regarding feeble-mindedness, connecting it to the social problems described by Goddard, seriously questioned. Eugenics laws passed in the 1920’s overcame many of the procedural hang-ups of earlier laws, thus opening the door for a direct engagement of the question of whether the state is justified in sterilizing feeble-minded people. Eugenics laws lost in court far more often than they won (six losses to three wins) but, it is important to note *how* they lost; that is, what the courts accepted as true even as ruled against sterilization statutes. It is reasonable to think that some of the cases could have gone the other way had certain procedural safeguards been in place.

These cases were argued and decided within a legal background that granted state legislatures broad authority to make coercive regulations for the public welfare. Howard Gillman argues that the “police powers” jurisprudence structured the judicial discussion over legitimate exercises of legislative power from around 1850 through 1936, and that this jurisprudence was widely recognized in both state and federal courts.\textsuperscript{70} This jurisprudence holds that legislatures have broad power to enact regulations in order to promote public health, safety, order, or morality, but that these regulations must not be “unequal, partial, class, or special legislation; that is, legislation which advances the interests of only part of the community.”\textsuperscript{71} So long a public purpose can be shown, a law will be presumed valid so long as the means employed are reasonable and it does not conflict with a clearly stated right. Far from being an era devoid of legal restrictions, William J. Novak has shown the manifold ways that U.S. jurisdictions regulated American life in the 19\textsuperscript{th} century,\textsuperscript{72} and much of the language and presuppositions of the police powers jurisprudence remained strong (if contested) through the first several decades of the 20\textsuperscript{th} century.\textsuperscript{73}

The statues that were challenged in the forced-sterilization cases were police-powers regulations that were passed to promote public health, morality, and order. In general, the legislatures thought that they could reduce the number of feeble-minded and/or criminal persons in their states by preventing such people from being born. Reducing the number of feeble-minded persons would lead to less crime, less immorality, and a smaller burden on the finances

\textsuperscript{71} \textit{Ibid.}, 49.
\textsuperscript{73} See language of the cases, \textit{infra}. The police powers doctrine has some purchase within American law, but it is much weaker than it once was.
of the state, which would otherwise have to financially support feeble-minded persons and their children.

In 1912 the Washington Supreme Court heard the first challenge to a eugenics statute. Peter Feilen had been convicted of “carnal abuse of a female child” and fell within the parameters of a 1909 Washington penal statute which allowed those convicted of such an offense (and found to be “habitual criminals”) to be sterilized either by castration or vasectomy (in the case of males).74 A brief submitted for the State showed the cluster of beliefs which, in their minds, justified sterilization in criminal and non-criminal cases:

“the fact that the great number of public charges [are] recruited from the defective classes . . . That defects physical and mental are transmitted to the offspring . . . [that] the natural tendency is for the abnormal to mate with the abnormal, consequently defectives are rapidly increasing in numbers as well as becoming more pronounced in type . . . [that] a large number of this class fail to respond to moral or intellectual influences, are lacking in self-restraint and inhibitory power . . . [that] this class of persons is prolific, as they know no law of self-restraint, and refuse to take into consideration their ability to care for their offspring . . . That the absolute segregation in colonies and industrial refuges of so great a number of existing defectives would necessitate the expenditure of enormous sums of money.”75

The similarity to what Goddard would later write in 1914 is clear; these concerns were the stock reasons given for eugenics laws during this period. Hereditary defects, an inclination to promiscuity, lack of self-restraint, irresponsibility, and high social cost made the feeble-minded a prime target of police powers regulations.

74 State v. Feilen, 126 Pac. Rep. 75 (1912).
75 Ibid., at 157-8.
Feilen’s lawyers only challenged particular aspects of this chain of reasoning. They challenged the notion that all criminals were feeble-minded, arguing that many criminals were “merely misdirected geniuses,” and often “more honest than financiers, especially financiers connected with the promotion of companies.” Therefore it did not make sense to sterilize criminals as a class. But this was not particularly controversial; the State (and the eugenicists) didn’t argue that every person who ever committed a crime was feebleminded, only that the feebleminded as a class were prone to criminality. Feilen’s lawyers argued that if anyone was to be sterilized, then it would make sense to sterilize the feeble-minded: “It has been demonstrated by study and observation that feeble-minded people produce feeble-minded offspring. Why not apply the operation of castration to this class of people? . . . In many parts of this country there are people who will not work . . . but are indolent, shiftless, and incompetent . . . Why not operate on this type and so protect society?" Apparently these arguments came easily, even to lawyers who were arguing against a sterilization statute. The feeble-minded seemed like a legitimate target for forced sterilization.

The Washington Supreme Court upheld the sterilization statute, ruling that the punishment was not cruel and unusual and that it was a legitimate exercise of the state’s police power. But this early win for a eugenics statute would soon be overshadowed by several consecutive losses. The next case in which a eugenics statute was challenged was Alice Smith v. Board of Examiners of Feeble-Minded, heard by the New Jersey Supreme Court in 1913, a case

76 Laughlin, Eugenical Sterilization in the United States, 150-1. The latter quote comes from an article written in Current Literature, March 1912.
77 Ibid., at 150-1.
78 It cited the “wonderful unanimity of favoring the prevention of their [i.e., the defectives’] future propagation. The Journal of American Medical Association recommends it, as does the Chicago Physicians’ Club, the Southern District Medical Society, and the Chicago Society of Social Hygiene,” as well as a number of popular publications. Laughlin, Eugenical Sterilization, 161.
which set a strong precedent for subsequent cases.\footnote{85 N.J.L. 46 (1913).} The challenged statute applied to “feebleminded (including idiots, imbeciles and morons), epileptics, rapists, certain criminals and other defectives” who lived in state institutions, both penal and charitable. According to the opinion of the court, the central question at hand was whether forced sterilization “is a valid exercise of the police power.” This power was discussed extensively in briefs submitted for both sides of the case and in the opinion of the court. The court defined this power as “the exercise by the Legislature of a state of its inherent sovereignty to enact and enforce whatever regulations are in its judgment demanded for the welfare of society at large in order to secure or to guard its order, safety, health, or morals.” This definition was standard for the time.\footnote{For a broad sampling of what courts said the “police power” was around this time, see Charles Bufford, “The Scope and Meaning of the Police Power,” California Law Review 4 (1916): 269-92.} Both sides and the court accepted that the state had such power; the question was whether the power was abused in this case.

Counsel for Board of Examiners acknowledged that there may be a conflict between the police power of the state and the rights of Alice Smith in this case, but urged the state to uphold the statute anyway: “the growing tendency of judicial decision is toward a liberal [i.e., loose] interpretation of the guarantees of personal rights, as contained in the State and Federal Constitution, subjecting the rights of the individual to restriction in favor of the general welfare.”\footnote{Laughlin, Eugenical Sterilization, 170.} Counsel went on to quote \textit{Noble State Bank v. Haskell}, in which Justice Holmes of the U.S. Supreme Court wrote,

“Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guaranties in the Bill of Rights. They more or less limit the liberty of the individual, or they
diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the states is limited by the Constitution of the United States, judges should be slow to read into the latter *a nolumus mutare* as against the lawmaking power.”

No doubt Justice Holmes had in mind the primacy of the legislative over the judicial power, but it also seems clear that when there was a conflict between the police power and individual rights, the presumption would be in favor of the police power.

However, the New Jersey Supreme Court rejected this expansive view of the police power. It held that “the statute in question was based upon a classification that bore no reasonable relation to the object of such police regulation, and hence denied to the individuals of the class so selected the equal protection of the laws guaranteed by the fourteenth amendment to the Constitution of the United States.” The main problem with the statute is that it only provided for the sterilization of people who were already in state institutions. If the intent of the law was to stop a certain class from reproducing, then why target only the small subset of that class currently housed in state institutions? Those in these institutions actually posed the least threat, as they were under the closest supervision and often segregated from members of the opposite sex. For these reasons the court ruled that the law did not have a reasonable relation to the object sought, and this use of the police power was stuck down. The Yale Law Journal applauded the case, stating that “A more unreasonable classification could scarcely be imagined.”

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83 Alice Smith, at 48.
A violation of equal protection, along the lines given in *Alice Smith*, was the reason judges gave most often when they struck down eugenics statutes. In addition to New Jersey, courts in Michigan and New York would strike down eugenics laws for this reason. The fault of such laws was that they did not treat like cases alike; they failed to require sterilization for similarly situated individuals. Of course, this argument has to do with the reach of sterilization laws rather than their inherent character – this argument does not condemn forced sterilization in principle.

Eugenics laws were also struck down twice for denying due process of law. Many eugenics laws left the determination of feeble-mindedness in the hands of a bureaucratic official; the “accused” did not know they were being considered for sterilization and did not have any real ability to contest the determination of feeble-mindedness. *Davis v. Berry* puts the concern succinctly: “The hearing is by an administrative board or officer. There is no actual hearing. There is no evidence. The proceedings are private. The public does not know what is being done until it is done. . . The prisoner is not advised of the proceedings until ordered to submit to the operation. And yet in many cases there will be involved a serious controverted question of fact.” As with the equal protection argument, the concern here is with process rather than content. The problem is with the way authorization is granted for sterilization rather than the sterilization itself.

However, the *Davis* court also held that forced sterilization constituted cruel and unusual punishment, and was prohibited in principle. Countering arguments that it was not cruel, the court wrote of vasectomy: “The physical suffering may not be so great, but that is not the only test of cruel punishment; the humiliation, the degradation, the mental suffering are always

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86 216 Fed. 413, at 418.
present and known by all the public, and will follow him wheresoever he may go. This belongs to the Dark Ages.”

The argument that forced sterilization constituted cruel punishment was the highest hurdle for eugenics laws to pass, but the *Davis* court was the only court which held that forced sterilization was necessarily cruel. No other decision ruled out sterilization in principle.

On the other hand, some court opinions explicitly indicated their support for aspects of the eugenics movement as they struck down eugenics statues. For example, even in *Davis v. Berry*, the case which struck down the eugenics statute on more grounds than any other, the court was willing to manifest some sympathy for eugenics: “As of course all persons concede that it would be better for society if some men did not beget children; diseased, deformed, mentally weak children, and criminally inclined, are brought into the world, oftentimes to their own shame and against the interest of the public. But are they not at the minimum?”

It is against the interest of the public that such children be born, but the problem was at a “minimum,” and the means chosen by Iowa to address it were inappropriate. Similarly, in *Mickle v. Hendricks*, heard in a federal district court in Nevada, the court struck down the eugenic statute for violating the Equal Protection clause of the 14th Amendment, but noted:

“Possibly in the exercise of its police power, it may be lawful for the Legislature to adopt reasonable measures, adequate and sufficient to prevent degenerates and persons afflicted with transmittable mental defects, physical disease, or criminal tendencies from begetting children; but legislation of that character must operate alike on all unfortunates

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87 216 Fed. 413, at 416.
88 In *Mickle v. Hendricks* the court noted that the Nevada State Constitution prohibited cruel or unusual punishment, and thus a law could be struck down if it failed either criterion. The court seemed inclined to call forced sterilization cruel, but in the end stated that “vasectomy in itself is not cruel,” and relied on the fact that it was instead unusual: “It is evident the purpose [of the Nevada prohibition] was to forbid newly devised as well as cruel punishments.” At 690. Vasectomy as punishment was not permitted because it was too innovative.
89 216 Fed. 413, at 416.
of the same class, and the classification must operate reasonably with relation to the end sought to be accomplished.\textsuperscript{90}

The problem here was of failing to treat like cases alike; apparently the court didn’t think eugenics was a bad idea in principle. Thus, some of the courts which struck down sterilization laws may very well have upheld other, properly-bounded laws.

By the mid-1920’s eugenics laws were written to overcome the due process and equal protection hang-ups of previous laws. In 1926 the Michigan Supreme Court handed down \textit{Smith v. Command}, reversing its own earlier ruling that forced sterilization was unconstitutional.\textsuperscript{91} The law at issue avoided legal snags by narrowly tailoring the class of persons to which sterilization could be applied and by allowing the courts to be involved in petitions for sterilization (rather than relying solely on boards of examiners, as in \textit{Alice Smith}). In response to the question of whether forced sterilization of the feeble-minded was a valid exercise of the police power, this court answered emphatically “Yes”:

“All [the feeble-minded] are a serious menace to society no one will question . . . It is true that the right to beget children is a natural and constitutional right, but it is equally true that no citizen has any rights superior to the common welfare. Acting for the public good, the state, in the exercise of its police powers, may always impose \textit{reasonable restrictions} upon the natural and constitutional rights of its citizens. Measured by its injurious effect upon society, what right has any citizen or class of citizens to beget children with an inherited tendency to crime, feeble-mindedness, idiocy, or imbecility? [. . .] Under the existing circumstances it was not only [the legislature’s] undoubted right, but it was its duty, to enact some legislation that would protect the people and preserve

\textsuperscript{90} 262 Fed. 687, at 688. Emphasis added.
the race from the known effects of the procreation of children by the feeble-minded, the idiots, and the embeciles[sic].\textsuperscript{92}

The court fully accepts that the “right to beget children” is a “natural and constitutional” right which citizens have; however, the court thought it was reasonable to suspend this right in the case of feeble-minded people due to the menace they posed to the common welfare. The violation of such rights should perhaps even be celebrated in the name of “progress.”\textsuperscript{93}

By this point it should be clear that the range of “reasonable” positions available to legal actors at this time was much different than it is today. The norms of reasonableness which structured the debate over eugenics in the early 20\textsuperscript{th} century were capacious enough for both the police power and individual rights to win some of the time. But this very fact - the fact that both could win some of the time - shows that the relative power of rights was weaker then than it is today. No court today could make the expansive statement in Smith v. Command about the prerogative of the state to override individual rights in the name of the public good, particularly in the realm of reproductive rights; or if one did, it could anticipate the criticism which it would receive. Arguing to ignore rights, as the Smith v. Command court did, has become increasingly “unreasonable,” and such defenses seem more and more radical the farther our norms of reasonableness move away from them.

\textsuperscript{92} Ibid., at 415. Emphasis added.

\textsuperscript{93} I should note that three of the eight justices who heard this case joined in a stinging dissent of the majority: “This act violates the Constitution, goes beyond the police power, and is void. I am wholly at variance with the theories sanctioned by the Chief Justice [McDonald]. The bodies of citizens may not, under legislative mandate, be cut into, and power of procreation destroyed by ligation or mutilation of glands or carving out of organs.” At 428. These dissenting judges fault the majority on almost every possible front. However, a law review article written on this case shortly after it was decided sided with the majority: “It does not seem possible to support, on any modern theory of rights or constitutional limitations the broad language of [the dissent] in which he denies utterly all legislative power to provide for sterilization.” Shartel, “Sterilization of Mental Defectives,” 859.
Buck v. Bell

The Virginia Supreme Court of Appeals ruled on Carrie Buck’s case the same year that Smith v. Command was handed down. The opinion noted that the Virginia Sterilization Act provided ample opportunity for feeble-minded persons to be informed of proceedings against them and to contest the evidence in “an impartial tribunal.” The court dodged the question of cruel and unusual punishment by noting, “The act is not a penal statute. The purpose of the legislature was not to punish by protect the class of socially inadequate citizens named therein from themselves, and to promote the welfare of society.” Finally, the court responded to the equal protection challenge by arguing that feeble-minded people outside of state institutions could also sterilized, as soon as they were brought into such institutions: “It cannot be said, as contended, that the act divides a natural class of persons into two and arbitrarily provides different rules for the government of each. The two classes existed before the passage of the sterilization act . . . There can be no discrimination against the inmates of the Colony, since the woman on the outside, if in fact feeble-minded, can, by the process of commitment and afterwards a sterilization hearing, be sterilized under the act.”

This line of reasoning ran directly against that of the New Jersey Supreme Court in Alice Smith v. Board, but the Harvard Law Review bought the argument: “The [Virginia] case answers [the equal protection] objection on the ground that such a classification is not unreasonable, because other defectives may be brought within the operation of the act by commitment [sic] to

94 Buck v. Bell, 143 Va. 310.
95 Ibid., at 315.
96 Ibid., at 318.
97 Ibid., at 323.
an institution.” And the Harvard Law review was not alone: eight years earlier (and against what it had said in 1914) the Yale Law Journal had already reached this conclusion, arguing “it is doubted whether the absurdity [of sterilizing feeble-minded people inside state institutions but not those outside] excoriated in the opinions exists in fact.” Part of the rationale here is that once sterilized, some feeble-minded people could be released into the community to live sterile and somewhat productive lives. People like Carrie Buck, for example, could get along in the community with some modest degree of support and direction; it was the constant threat of propagation which required her to be confined in the Colony. Thus, institutions such as the Virginia State Colony for Epileptics and Feeble-minded could function as clearing-houses for sterilizing operations: patients would be admitted, sterilized, and sent back to the community, reliving the state of the enormous burden of permanent institutionalization and avoiding the threat of future generations of feeble-minded children. Harry Laughlin, head of the ERO and prominent eugenicist, actually argued that the equal protection argument worked to promote the cause of eugenics: “The courts are inclined to hold it to be class legislation to require the sterilization of persons of a certain degree of degeneracy within a state institution, and not to

98 “Constitutional Law – Validity of Sterilization Laws,” Harvard Law Review 39 (1926): 770. The article continues: “Whether sterilization of defectives is justifiable would seem to depend upon the social desirability of such action, which in turn depends upon the probability of the transmission of the defect. Some conflict of medical opinion on this question exists, but there would seem to be enough in support of sterilization to justify as not unreasonable the legislative finding of its desirability.”


100 It turns out that this is exactly what happened to Carrie Buck. A few weeks after she was sterilized she was sent out to work in the community. See Lombardo, Three Generations, 185. The Alice Smith court strongly rejected the idea of sterilizing some people and then letting them go: “The suggestion that the classification might be sufficient if the scheme of the statute were to turn the sterilized inmates of such public institutes loose upon the community, and thereby to effect a saving of expense to the public, is not deserving of serious consideration. The palpable inhumanity and immorality of such a scheme forbids us to impute it to an enlightened Legislature that evidently enacted the present statute for a worthy social end.” 85 N.J.L 46, at 55. The “inhumanity” referenced here seems to be in turning out inmates who otherwise would need care; the court does not expound on why this would be immoral.
apply the same demands for the sexual sterilization of persons of the same degree of degeneracy who are found in the population at large. Thus, again, the Bill of Rights has worked hand in hand through judicial decision with the needs of eugenical progress in the application of eugenical sterilization.”¹⁰¹

When this case reached the U.S. Supreme Court, the Court came down 8-1 on the side of the police power and the Virginia Sterilization Act.¹⁰² In an infamous opinion written by Justice Holmes, the Court sustained and improved upon the Virginia Supreme Court of Appeals’ equal protection argument, implying that it would be unreasonable to do anything else:

“But, it is said, however it might be if this reasoning [regarding the desirability of sterilizing the feeble-minded] were applied generally, it fails when it is confined to the small number who are in the institutions named and is not applied to the multitudes outside. It is the usual last resort of constitutional arguments to point out shortcomings of this sort. But the answer is that the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow. Of course, so far as the operations enable those who otherwise must be kept confined to be returned to the world, and thus open the asylum to others, the equality aimed at will be more nearly reached.”¹⁰³

Strangely enough, the “usual last resort of constitutional argument” was the very argument that three courts had relied on to strike down other sterilization statutes. The Court does not cite these

¹⁰² The lone dissenter, Pierce Butler, gave no reasons for his dissent. Often his dissent is attributed to his Catholicism, but there is no direct evidence that he dissented for a religious motive. An Iowa statute had reached the Supreme Court in 1916, but the law in question was repealed during the pendency of the case, and thus the Court took no position. See Laughlin, *Eugenical Sterilization*, 200-1.
¹⁰³ *Buck v. Bell* at 208.
cases (indeed, only one citation to case law appears in the entire opinion: Jacobson v. Massachusetts, which upheld compulsory vaccination) and seems to be either unaware or dismissive of them. Though the Court does not use the phrase “police power,” it is clear that the Court believes the state has the prerogative to act in the name of the public good, even if that means foreseeable suffering on the part of some.

The Court also responded to a challenge from Buck’s lawyer that substantive due process invalidated the law. In a brief to the court, he had argued that “In determining whether the constitutional requirement [of due process] has been observed we must look to the substance rather than the form of the law; for form of the procedure cannot convert the process used into due process of law, if the result is to illegally deprive a citizen of some constitutional right . . . The inherent right of mankind to go through life without mutilation of organs of generation needs no constitutional declaration.”

Though there certainly was Supreme Court precedent for this view, the Buck Court was unconvinced. In the opinion of the Court, the good of preventing feeble-minded persons from procreating overrode the appeal to individual rights:

“We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if

\[104\] 197 U.S. 11.
\[105\] Ibid., at 201.
\[106\] “The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty, indeed, are under a solemn duty, to look at the substance of things whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.” Mugler v. Kansas, 123 U.S. 623 (1887).
instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.”

Again, though the Court does not use the phrase “police power,” the concept is clearly implicit in the analysis as a premise for why the state is justified in sterilizing some people for the common good (in his brief to the Court, Bell’s lawyer explicitly invoked the police power and urged the analogy to vaccination). The Court repeats the familiar connections between mental disability, crime, poverty, and incompetence, as well as the notion that these problems are trans-generational characteristics of a certain kind of citizen, as the justifications for why the state could appropriately sterilize Carrie Buck. The question of “rights” does not appear, but the language of “sacrifices” (even if they are “often not felt”) seems to imply that the feeble-minded will have to give up something important for the general welfare to be promoted. In sum, the Court seemed to accept the norms of reasonableness that made forced-sterilization plausible.

Response to Buck

How did the press and intellectual elite respond to Buck v. Bell? The response was largely positive. The New York Times’ report of the article was wholly congratulatory, touting the “Right to Protect Society” (a right of the Court, apparently, rather than of Ms. Buck) in the

107 Buck v. Bell at 207.
108 Ibid., at 203: “The Act is a valid exercise of the police power. The courts generally are indisposed to suffer the police power to be impaired or defeated by constitutional limitations. [citations omitted] Section 159 of the Constitution of Virginia provides that ‘the exercise of the police power of the State shall never be abridged.’ An exercise of the police power analogous to that of the statute here in question may be found in the compulsory vaccination statutes . . .”
109 Lombardo, who makes of point of emphasizing the forces arrayed against sterilization, agrees that “Press reaction was overwhelmingly positive.” Three Generations, 174.
subheading of its coverage.\textsuperscript{110} The front page of the \textit{Los Angeles Times} noted that \textit{Buck} was “an opinion deemed of much importance because of the agitation for similar legislation in other states.”\textsuperscript{111} \textit{Time} magazine condescendingly stated that “sentimentalists were vexed” by the decision, and noted that because the decision would not go into effect for 40 days, “Miss Buck has 40 days left in which to be ‘the potential parent of socially inadequate offspring.’”\textsuperscript{112} Newspapers from Georgia, Tennessee, Illinois, Maryland, Virginia and Montana all published positive or uncritical articles about the case.\textsuperscript{113}

\textit{Buck} was also reported in several law reviews, and virtually all of them were also positive.\textsuperscript{114} An author for the \textit{Lincoln Law Review} dryly stated that the Court “approve[d] the procedure about which there was no very stout contention.”\textsuperscript{115} An article published in the \textit{Columbia Law Review} argued that “the classification set up by the [Virginia] statute is not unreasonable, [and] evinces a liberal attitude.”\textsuperscript{116} In sum, much of the press and legal community at the time thought that the Supreme Court clearly got it right; or, at least, did not get it terribly

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\bibitem{111} “Supreme Court Upholds Sterilization of Unfit,” \textit{L.A. Times}, May 3, 1927, 1.

\bibitem{112} “Sterilization,” \textit{Time}, May 16, 1927.


\bibitem{114} See also: Edgar Bronson Tolman, “Review of Recent Supreme Court Decisions,” \textit{American Bar Association Journal} 13 (1927): 313-19; “Constitutional Law – Sterilization of Mental Defectives,” \textit{Michigan Law Review} 25 (1926-1927): 908-9. The one critical article of eugenic sterilization I found around the time of \textit{Buck} was Clarence J. Ruddy, “Compulsory Sterilization: An Unwarranted Extension of the Powers of Government,” \textit{The Notre Dame Lawyer} 3 (1927): 1-16. This article is critical of eugenic sterilization in general, and was prepared before \textit{Buck v. Bell} was decided. However, it does not deny the connection between feeble-mindedness and social ills and, predictably, takes up the banner of individual rights against the police power. See also Daniel J. Kelves, \textit{In the Name of Eugenics: Genetics and the Uses of Human Heredity} (Cambridge, MA: Harvard University Press, 1995), 112.


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wrong. The business-as-usual accounts of the case betray the fact that this case did not strike its readers as particularly unusual. In a word, the ruling seemed “reasonable.”

Conclusion

How could the various American courts we have reviewed treat the issue of forced sterilization so differently? Why was the equal protection concern which was controlling to the Alice Smith court a mere trifle to the Buck Court? Personal idiosyncrasies can account for part of the reason, but it was also true that, as a matter of social fact, a variety of competing and often contradictory modes of argumentation were available and persuasive to legal actors in the early 20th century. Constitutional rights did have a place and commanded some degree of rhetorical force; however, as we have seen in both Smith v. Command and Buck v. Bell, rights did not always act as trump cards in legal debate. This was true even when a “natural and constitutional right” was acknowledged to exist, as in Smith v. Command. In the case of Buck, the Court seems to have been aware that there was not perfect equal protection, but equal protection was treated as a goal to be aspired to, not a Constitutional requirement. That the Supreme Court could make such a ruling and receive virtually no substantial criticism (in the form of critical dissents or law review or newspaper articles) for an apparent violation of the 14th Amendment shows that the prominence of rights was relatively weak, at least in this particular area of law. The police power could reasonably trump individual rights under the right conditions.

To clear up a possible misunderstanding, I have not argued that the decision in Buck was inevitable. Eugenic supporters did not have a hegemonic hold on the social imagination. The

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117 Lombardo repeatedly emphasizes the fact that there were criticisms of eugenics during this time, but he doesn’t mention many. For example, on p. 177 Lombardo states that Bell was “Oblivious to critics;” however, up to this point in his narrative of the post-Buck response, Lombardo has only cited ambiguous critics of Buck; the response seems to be, as Lombardo himself puts it, “overwhelmingly positive” (174). Lombardo does note a number of articles written by Catholics around this time (many before the actual ruling in Buck), but such criticisms seem to be confined mainly to Catholic publications. See Three Generations, chapter 13.
norms of reasonableness relative to eugenics law were capacious enough to allow a variety of competing and often contradictory positions to be defended and considered reasonable. Forced sterilization had its enemies in law, politics, religion, and science. However, the ease with which the Court approved forced sterilization, and the relatively unproblematic reception the case was greeted with by the elite and popular culture, show that the norms of reasonableness gave such an outcome a privileged status (or, more modestly, held open the possibility for an influential institution such as the Court to make up the public’s mind in a decisive way, at least for a time). Showing this provides a compelling explanation of why the Court decided *Buck* as it did.
Chapter 2: Getting Into Mischief: On What it Means to Appeal to the U.S. Constitution

In 1982 Phillip Bobbitt usefully listed six kinds, or “modalities,” of arguments that can be made about the meaning of the U.S. Constitution. Though I disagree with the way he characterizes some of the modalities, Bobbitt’s exercise is an important one. Listing and distinguishing sources of argumentative authority allows for a more profitable discussion about the nature of each source and the ways it interacts with (or compliments, trumps, dilutes, etc.) the others. Not all sources of authority are created equal: the authority of prudence is not the authority of tradition, and the authority of the text is not the authority of doctrine. Defining the various kinds of arguments and articulating their authority allows legal and political officials to be clear about why they are justified in acting as they do.

Of all the various sources of authority, the authority of “the text” is arguably the least controversial. Virtually everyone agrees that the words of the Constitution should have great weight in Constitutional deliberation. But what authority, exactly, is granted by the text? Should we follow the “plain meaning” of the text, the “original meaning,” or something else? Do the purposes for which the text was written have bearing on how they should be interpreted? What about the location of particular parts of the text within the overarching constitutional order? Can historical changes alter the meaning of the text?

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This paper attempts to define the authority that is granted by the text\(^3\) and how interpreters should seek to ascertain that meaning. I will attempt to articulate the authority created when “the People” explicitly ratify a Constitutional text at a discrete moment of time. I stress, from the outset, that this is not a full theory of adjudication. A full theory of adjudication would give guidance about how judges and others should apply all the various modalities of Constitutional argumentation to legal and political controversies. My aim is more modest: I intend to articulate how we can ascertain the authority granted by the intentional creation of a textual provision at a particular moment of time. Understanding the authority that is constituted by the explicit consent of the people is a crucial part of any plausible theory of adjudication, though a complete theory of adjudication will include many more considerations.

The view I will ultimately defend draws on the “Mischief Rule” in English law and is a kind of originalism. The Mischief Rule instructs interpreters to read statutes in the light of the problems they were meant to solve (the “mischief”) and the remedies which the lawmakers created to address those problems. This approach (which I expand and modify) is useful because it is sensitive to the way that particular laws fit into an overarching political and legal system, the purposes of the law, and the authority of the lawmakers. In appealing to the Mischief Rule I do not wish to enter into an esoteric discussion of English legal history; rather, I hope to draw from it certain insights which are useful in discerning the meaning of the U.S. Constitution.

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\(^3\) It’s hard to know which label is most appropriate for this form of authority. I’m strongly tempted to call it “Constitutional authority,” for it is the authority brought into being by the creation of new constitutional provisions, and further, the authority which the Constitution claims for itself (“We, the People . . .”). However, such a term could be misleading, for “constitution” refers both to the fundamental legal charter of the United States (ratified in 1788, amended 27 times) and to the structure or form of the government. Bobbitt’s definition of textual authority focuses on “the present sense of the words of the provision” and thus departs from my own view. See Bobbitt, Constitutional Fate, 7.
The remainder of the paper will proceed as follows: I begin by interrogating two views about the meaning of the text which I believe make symmetrical mistakes. First, I engage an interpretive theory which hold that “interpretation, properly so-called, consists in recovering the intended meaning of the texts’ authors,” a particular view about the meaning of the text. Drawing on a recent defense by Larry Alexander and Emily Sherwin, I will criticize the “Semantic Intentionalist” view on three fronts: for misunderstanding the relevance of “sentence meaning;” for over-drawing the distinction between actual authors and hypothetical authors; and for not noting important moral differences between different kinds of interpretation. I then engage the recent work of Jack Balkin, who argues that interpreters must seek to “ascertain” the original meaning of the Constitution but have relatively broad authority to “construct” the meaning of the Constitution when it is vague or ambiguous. I argue that Balkin’s typology of meaning biases him towards finding open-ended, authority-granting passages, and that he is not sufficiently attentive to the overall structure or purposes of the Constitution. Whereas Alexander and the “semantic intentionalists” have too “thick” a view of textual meaning (that is, they seek to draw too much out of the text), Balkin inappropriately excludes too many of the original purposes of the text, as well as its structure and context, and thus has too “thin” an understanding of textual meaning. After engaging these authors I articulate my own view, which focuses on how laws seek to solve particular problems and how they alter the legal and political status quo. Such an approach takes into account the context of enactment, the intentions of the lawmakers, and the limited grant of authority given by the law.

**Semantic Intentionalism**

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5 My label.
Though often overlooked in U.S. constitutional studies, a strong and sophisticated defense of Intentionalists Semantics has been developed in the writings of Larry Alexander, 6 Emily Sherwin, 7 Stanley Fish, 8 Saikrishna Prakash, 9 Stephen Smith, 10 Steven Knapp, 11 and Walter Michaels. 12 These “Semantic Intentionalists” 13 argue that it is completely arbitrary that a sign or string of signs 14 means one thing and not another. The “actual meaning” 15 or “intended meaning” 16 or simply “meaning” of a set of signs (including legal texts) is what a speaker or author intends to mean, regardless of whether anyone else understands. Knapp and Michaels say that if one speaks English to a group of people who only speak French, communication may fail, but the speaker’s meaning remains the same regardless of whether the audience understands the meaning. 17 Alexander and Prakash say that “If a speaker says, ‘Gleeg, gleeg, gleeg,’ it means what the speaker intended it to mean, even if to others it sounds like nonsense.” 18 Fish cites Wittgenstein as asking, “Can I say ‘bububu’ and mean ‘If it doesn’t rain I shall go for a walk?’” Fish thinks the answer is “yes” and goes on to explain: “Of course you may not communicate

7 See supra note 3.
12 Ibid. This list is not meant to be exhaustive.
14 I use “sign” loosely to refer to any symbolic representation.
15 Alexander and Prakash, “Is that English?,” 969
16 Alexander and Sherwin, Demystifying, 188.
that meaning (or any other) by saying ‘bububu’; but failure to communicate a meaning does not meant [sic] that it was not intended; and while success of communication will often be a contingent matter, dependent on others and the world, the success of intending (assuming that you are not mentally ill and incapable of forming an intention) is certain.”\textsuperscript{19}

Particular persons can use signs in conventional ways in order to make their meaning clear, but conventional meaning does not determine the meaning of a sign. Alexander and Sherwin say that the conventional meaning of words “merely reports what most speakers mean by a certain string of marks or sounds.”\textsuperscript{20} They point out that sometimes the same set of symbols means different things in different languages. For example, the symbols that form the word “canard” mean “duck” in French and “a misleading statement” in English. Without knowing who the speaker is or what she meant by the use of the sign, how can we even know which language the sign is in, or if language is being used at all?\textsuperscript{21} “Speaker’s meaning is not tethered to any of the [sentence] meanings, much less any one in particular.”\textsuperscript{22} Since “Any sign can be used to signify anything,”\textsuperscript{23} it is only the intentions of speaker which can fix the meaning of a sign with the meaning it has, rather than any of the other infinite possible meanings.

To sum up: the Semantic Intentionalists assert that 1) symbols have no inherent meaning, 2) only intentional agents can endow marks or sounds with meaning, and therefore 3) the interpretive enterprise is exclusively a search for the intended meaning of an author. For, they argue, in the absence of an author, there is literally nothing to interpret.


\textsuperscript{20} Alexander and Sherwin, \textit{Demystifying}, 134.

\textsuperscript{21} Alexander and Prakash, “Is that English?,” 974.

\textsuperscript{22} Alexander and Sherwin, \textit{Demystifying}, 137.

\textsuperscript{23} \textit{Ibid.}, 136.
The Semantic Intentionalists illustrate these points with a variety of interesting examples, of which I will cite three. The examples make the Semantic Intentionalists’ theoretical points clearer and will be useful for the subsequent discussion. The point of the examples is to show (in different ways and for different purposes) that interpretation is exclusively a search for the meaning the speaker intended to communicate.

On the point that symbols have no intrinsic meaning, Alexander and Prakash invite us to “consider some people who come upon marks on the ground that are shaped like a ‘c,’ an ‘a,’ and a ‘t.’ They begin to debate whether the marks mean ‘domestic tabby cat,’ ‘any feline,’ or ‘jazz musician.’ They are then told that the marks were made by water dripping off a building. Their debate over meaning should now cease: no author, no meaning.”

The second, also from Alexander and Prakash, is of Mom and the “autobahn.” There is an article of furniture which most English speakers would refer to as an “ottoman;” however, Mom, for some reason, calls it as an “autobahn.” Of course, competent speakers of English (and some other languages) use “autobahn” to refer to a speedway in Germany. Now, if Mom asks you to bring her the “autobahn,” how should you understand her utterance? Is she really asking you to dig up the German speedway and bring it to her? Or, should you simply get what you know she is referring to, namely, (what you would call) the “ottoman?” The answer is clear – bring her the article of furniture, not the speedway. You know that in saying “autobahn” she means “ottoman,” and her intended meaning is all that matters in understanding and appropriately responding to her request.

The third example comes from Knapp and Michaels and illustrates how a particular utterance can have no single meaning if its multiple authors have different intentions:

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24 Alexander and Prakash, “Is that English You’re Speaking?” 977
Two historians coauthor a book on the French Revolution. As they trade drafts back and forth, at some point one of the inserts the following string of signifiers: “In 1789, the streets of Paris were awash in canards.” They intentionally publish the book with these signifiers included. But they do not realize at the time that, by the signifier “canard,” one of them intends to signify (in English, as glossed by American Heritage) “unfounded or false, deliberately misleading stor[ies],” while the other intends to signify (in French, as glossed by Larousse) ducks (because she wants to convey that the streets were unhealthily cluttered with livestock). Would it make sense to argue that, although neither author intended this, the text is correctly interpreted as asserting that Paris was filled with baseless rumors and ducks?\(^{25}\)

Knapp and Michaels think the answer is clearly “no:” “Or should we simply say that the two authors inadvertently attached two different signifieds to the same signifier, thereby inadvertently producing two different signs, with two unrelated meanings?”\(^{26}\) Therefore, the sentence about “canards” (authored by two individuals) has no single meaning.

This last example will raise an important issue in legal (and constitutional) interpretation because contemporary law-making almost always includes more than one person. On the Semantic Intentionalist view, if there is not sufficient overlap of intentions between joint authors of a text on particular elements of the text, there will be no single meaning of those parts of the text. The Semantic Intentionalist view may entail doing away with much of what we currently recognize as law.

The analysis of the Semantic Intentionalists goes awry in certain crucial respects. Though they do alert us to an important truth about language – namely, that it requires, at the very

\(^{25}\) Knapp and Michaels, ”Not a Matter of Interpretation,” 666.
\(^{26}\) Ibid.
minimum, intentional agents who can understand and communicate meaningful signs – their analysis misapprehends the way we share a language and, consequently, important differences in the way we interpret signs and words. Because we share language in a robust sense we can anticipate how others will (in all probability) understand our utterances, and can be held accountable for what we knowingly lead others to believe.

In what follows much of my attention will be on Alexander and Sherwin’s book, *Demystifying Legal Reasoning*. I choose to focus on Alexander and Sherwin because they articulate the view in greater detail and to defend it against more criticisms than other proponents of the view. However, I believe many of the criticisms also apply to the other Semantic Intentionalists, inasmuch as they make many of the same assumptions and share the same conclusions.

**Natural Meaning, Sentence Meaning, and Speaker’s Meaning**

Many of the Semantic Intentionalists’ arguments depend upon the distinction between *natural meaning* and *non-natural meaning*. Paul Grice, who articulates this and other distinctions, argues that the relevant sense of “meaning” in “These spots mean measles” is “natural meaning” because (among other reasons) it doesn’t make sense to argue from the presence of the spots that anyone intended to mean anything by them. The spots simply indicate the presence of a certain physical condition or state of affairs, in the same way that certain geological patterns “mean” that water covered a certain area long ago. On the other hand, the relevant sense of “meaning” in “Those three rings of the bell (of the bus) mean that the bus is full” is “non-natural meaning” because we take the rings as having been intended to convey
something by someone. Non-natural meaning is made possible and sustained by intentional agents who have the capacity to understand abstract signs as referring to (or standing for) something beyond themselves.

More could be said about this distinction, but this brief sketch will suffice for our purposes. With this in mind, we can turn to the “c”, “a”, and “t” example referenced above. What if we originally think that a series of marks in the sand is the product of an intentional agent, but later learn that the marks were formed by water dripping off a building? Do the “letters” have non-natural meaning? My answer is “yes,” but only in a qualified sense. To see why we need a further distinction, that between “speaker’s meaning” and “sentence meaning” (the latter category is also known as “utterance meaning,” Alexander and Sherwin’s preferred term, or “word meaning”); for uninteresting reasons I use “sentence meaning” throughout the paper). Alexander and Sherwin discuss this distinction in some detail, defining speaker’s meaning as “the meaning a speaker intends to convey by a word or words (or other signifiers) on a particular occasion,” and sentence meaning as “what those words or signs conventionally mean (in various syntactical and grammatical contexts but apart from any particular instance of their use).”

While most philosophers of language would admit that it is meaningful to discuss both categories of meaning, Alexander and Sherwin attempt to entirely close down the category of sentence meaning: “A moment’s reflection will reveal that [sentence] meaning is wholly derivative of

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29 Alexander and Sherwin claim to be following Grice, but so far as I can tell, Grice uses “utterer’s meaning” and “speaker’s meaning” somewhat similarly and contrasts both with “sentence meaning,” which I think is what Alexander and Sherwin mean by “utterance meaning.” For Grice on utterer’s meaning, see Paul Grice, Studies in the Way of Words, 92, 105.
30 Alexander and Sherwin, Demystifying, 134. As I point out above, the term they use is “utterance meaning;” I find this term confusing and substitute it with “sentence meaning.”
speaker’s meaning and merely reports what most speakers mean by using a certain string of marks or sounds.” Similarly, “Speaker’s meaning – what speakers intend to convey by the sign – is always the independent variable, whereas [sentence] meaning, being merely a report of speaker’s meanings, is always the dependent variable.”

The claim that sentence meaning is “wholly derivative” of speaker’s meaning effectively dispenses with sentence meaning altogether. If sentence meaning never tells us anything that speaker’s meaning doesn’t already tell us, then why do we hang onto the category of sentence meaning at all? Against this line of reasoning I argue that sentence meaning is a useful analytical category because language exists as rule-governed inter-subjective practice. A rule, as Alexander and Sherwin write, “is a general prescription that sets out the course of action that individual actors should follow in cases that fall within the predicate terms of the rule.” Within a particular language there are fairly stable and definite rules (malleable over time, to be sure) which allow speakers the possibility of “correctly” using words. Because there are rules for using words we can know in advance the appropriate application of a word.

The existence of such rules for using words is a condition of the possibility for most of the speech acts we employ and interpret. Without a common stock of terms and significations with commonly understood meaning (at least within a particular linguistic community), communication as we know it would probably not be possible. As John Searle puts it, “A sentence type is just the standing possibility of an intentional speech act.” Sentence meanings

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31 Ibid.
33 Searle, “Literary Theory and Its Discontents,” 646. Searle goes on to give the following example of a thought which simply could not be communicated (or thought at all, for that matter) if the speaker did not possess a language with reasonably stable sentence meanings: “If only Roosevelt had not been so sick at the time of the Yalta conference in 1943, no doubt the situation in the Eastern European countries in the post-war decades would
make it possible for us to actualize communicative intentions. This, then, is why we should not write off sentence meaning as “wholly derivative” of speaker’s meaning: because we could hardly manage without a category for the publicly shared norms which guide the use of signs in our use of language. Indeed, on Alexander and Sherwin’s view it’s hard to conceive of a sense in which there are languages at all; there are only speakers who emit sounds which they hope others will understand.  

Now, in a certain sense it is true that we can create new meanings by an act of will. Alexander, Fish, and other Semantic Intentionalists make much of this ability, as shown in the “Gleeb, gleeb, gleeb” and “bububu” examples above. In these examples the speaker consciously endows “nonsense” words with a meaning – one wills that “bububu” mean “If it doesn’t rain I shall go for a walk,” or anything else, even though the speaker may never have thought to mean this by these signs before (and may mean something different by it next time). But such innovation is the exception rather than the rule, and in fact, such a move will be interpreted (both by us and by others) according to prevailing conventional norms. In the normal case, we simply intend to mean the conventional meaning of a word when we use it. Language is not something (for the most part) which we invent; it is something we follow. As Joseph Raz says, “Each person takes his use of terms and concepts to be governed by the common criteria for their use . . . The criteria that govern people’s use of language are simply the criteria generally relied on in

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still have been unfortunate in the extreme, but it seems reasonable to suppose that the sequence of disasters and catastrophes that overcame those countries would at least have been less onerous than it in fact was.” How could such a communicative intention either be conceived or conveyed if the speaker did not have a stock of word-meanings which were relatively uncontroversial and secure?

34 On Alexander and Sherwin’s view it is hard to imagine an important sense in which speakers misuse words. If the only sense in which we can analyze meaning is according to the intentions of the speaker, then our practice of censuring people for “misusing” words is completely mistaken. Hearers only mishear; speakers never misspeak.
their language.” Most of the time one doesn’t try to will that words mean anything – we simply understand words as having a certain meaning and use them appropriately.

Though the Semantic Intentionalists don’t ever quite say it, in their view there seems to be a strong (ontological?) sense in which intentional actors create the meaning of signs. Without the “backing” of an intentional actor, a series of marks or sounds can have no semantic meaning, it can only “look like” signs that intentional actors might make to create meaning. For example, in the “e”, “a”, and “t” example above, Alexander and Prakash say that as soon as it is learned that signs in question are not the result of an intentional act, “debate over meaning should now cease: no author, no meaning.” This maxim is not quite right; it should instead read, “no author, any meaning,” because the symbols do have a meaning according to the conventional rules of English (a point which Alexander grants elsewhere). The signs have a (or many) sentence meanings even if they lack a speaker’s meaning. Barring exceptional circumstances we may not have any reason to attribute one sentence meaning rather than another to symbols made by non-intentional processes; at the same time, it can hardly be denied that the series of marks that form the sign “cat” do have a set of meanings in English. Alexander and Sherwin deny this, as

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36 Alexander and Sherwin, Demystifying, 136.
37 Alexander and Sherwin make the point in another version of the “cat” example: “Although it could mean any of those – indeed it could mean almost anything given infinite possible languages with infinite possible ways to signify meanings – without the backing of someone’s intended meanings, those unintended shapes have no meaning at all.” Demystifying, 173. It’s not clear in what sense the signs have “no meaning at all” if they do have a meaning in infinite possible languages.
38 Walter Sinnott-Armstrong gives an example of lightning striking a tree in an intersection and producing the symbols “STOP,” and argues that the symbols are meaningful even if no agent produced them. Though I grant the point that the symbols have an utterance meaning in English (as well as an utterance meaning in any number of logically possible languages), it seems that intentionality always gives us a strong reason to attribute meaning to a set of symbols, and other considerations may give us only weak or partial reasons to attribute meaning. See Sinnott-Armstrong, “Word Meaning in Legal Interpretation,” 474.
39 Alexander and Sherwin, Demystifying, 136: “Thus, signs signify whatever their users intend to signify; however, when the ‘signs’ are created in the absence of any intent to signify something, they are not signs at all, even if they
did an early paper by Knapp and Michaels, but Searle has it right: “In linguistics, philosophy, and logic words and sentences are standardly defined purely formally or syntactically . . . from the definition of formal types, it follows trivially that a formal type can be instantiated in a concrete physical token, independently of the question of whether or not that token was produced as a result of human intentions.”

I hold that the symbols in Alexander and Sherwin’s example do have non-natural meaning because of the role sentence meaning plays in our description and evaluation of language: it must be the case that there exist a set of symbols with relatively uncontroversial sentence meanings in order to speak a language at all. Anything that conforms to the formal features of sentence meaning is that formal sign, even if it lacks an author.

**Not-So-Hypothetical Authors**

However, the Semantic Intentionalists are sure to point out that I cannot be interested in just any old sentence meaning. Why privilege a particular sentence meaning, of which there are an infinite number, over speaker’s meaning, of which there is only one? How can one justify a particular sentence meaning as the ‘right’ one?

Here the Semantic Intentionalists introduce a distinction between actual authorship and hypothetical authorship. On their account, there are only two interpretive alternatives: seek the intention of the actual author (the person or persons who produced the sign) or that of a hypothetical author, one which we imagine has certain characteristics and qualities, etc. Stated like this, it’s easy to see why the Semantic Intentionalists frown upon the latter option. If our construction of the hypothetical author is unconstrained we can give him any intentions we like

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40 See Knapp and Michaels, “Against Theory,” 728.
and can therefore secure any meaning for any sign. Hypothetical authors (on this view) completely underdetermine the meaning of signs, telling us anything, or, more precisely, nothing.

Interpreting a text according to a hypothetical author would be useless if we arbitrarily assign characteristics to that author, as Alexander and Sherwin do at one point. But, we can have very good reasons for attributing a particular sentence meaning to a text due to what people involved in the creation of the text both understand and intend. It makes sense to hold people to a particular understanding of a text when they knowingly take actions (such as signing a contract, voting for a bill, etc.) which they know will be understood by others in a certain way. Thus, it is not an arbitrarily-created hypothetical author we are interested in, but rather what the people who created the law understand about how their actions will be interpreted by others.

This is true even if they don’t have specific semantic intentions about the terms of the text in question. Gideon Rosen makes the point with regards to contract law: “when courts and commentators invoke the personal meanings of the parties [to a contract], they are not referring to anything specifically semantic or linguistic at all, but rather to the legal intentions and

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42 “Now, it is possible to imagine a regime of legal interpretation in which interpreters – judges, administrators, lawyers, and ordinary citizens – were instructed to interpret the legal rule in question as if it had been authored by a hypothetical person or body with certain characteristics. For example, the interpreter might be instructed to assume that the author(s) of the legal rules in question spoke standard English (as set forth in a particular dictionary), compiled with the orthodox rules of grammar (again, as set forth in a particular book on style and usage), and, where the dictionary gave a word two or more meanings, always adopted the first meaning listed.” Alexander and Sherwin, Demystifying, 137-8. Notice the strange way Alexander and Sherwin advance the idea. Why would we assume that the author meant the first meaning in the dictionary rather than any other? Competent speakers of the language know how to draw meaning from the context to select the appropriate definition, as Alexander and Sherwin recognize in the case of rules. It seems that Alexander and Sherwin have constructed a straw man.
expectations of the parties – their intentions to change the legal score in certain ways by means of the contract in question.”

Of course, the interpretation of legal intentions – “intentions to change the legal score” – will be determined by the various conventions about when and how such intentions are actualized in a society. J.L. Austin describes how the conditions for a “felicitous” speech act are shared by speakers of a language, and a similar analysis could be made for intentions in other areas of life. There is no way for us to interpret others but on the basis of some convention (whether general or individual) about what they probably mean. As Raz writes, “In the cycle of convention and intention, convention comes first. Not in the sense that we follow convention rather than intention, but in the sense that the content of any intention is that which it has when interpreted by reference to the conventions of interpreting such expressive acts at the time. And that is the case even with regard to an intention which, once expressed, changes these conventions.” When interpreting a legal text, the question is not, “what semantic meaning did the authors intend?”, but rather, “given what we know about the parties whose authority made this text ‘law,’ how would a reasonably well-informed observer understand their action to alter the legal status quo?”

Alexander and Sherwin actually recognize the importance of convention in the interpretation of texts, and it is worth noting because their own view resolves some of the problems they believe are inherent in hypothetical authorship. To see how we will need to make

45 Joseph Raz, Between Authority and Interpretation (Oxford: Oxford University Press, 2009), 286. Raz is somewhat imprecise when he says that “the content of any intention is that which it has when interpreted by reference to the conventions of interpreting such expressive acts at the time.” These conventions could be ones that I have for myself or ones which the community of language users shares in general. It is meaningful (and sometimes decisive, as in the case of wills) to understand what a person meant when he spoke; in these cases his own conventions of meaning will take priority.
a brief (but merited) detour through Alexander and Sherwin’s defense of determinate intentions and rules in the face of the “Kripkenstein” critique. As we have seen, Alexander and Sherwin argue that the intentions of the speaker or writer determine the meaning of a text. But, according to them, this raises an important problem, brought to the fore by Saul Kripke’s influential but controversial interpretation of Wittgenstein. The problem is this: “no mental state content, present or past, can by itself ever make it true that by uttering certain words, one has intended some future act.”46 Why is this the case? Because one can consistently claim that the application of a term to new and unfamiliar cases should follow rules other than the rules one has followed to apply the term to previous, known cases. Kripke gives a mathematical example. Assume you have never added numbers greater than 50. You are asked to perform the mathematical operation “68 + 57”. You might think that you are required to employ the “+” as you have in the past, but there is no necessity that you do so. You could consistently claim that “+” means “plus” for numbers smaller than 57 and “quus,” a different mathematical function (which yields the result “5” for the equation) for all numbers greater than or equal to 57.47

Alexander and Sherwin see this as a threat to their position because, in their view, it has the potential to undermine our ability to claim that our intentions have any determinate content. Their defense is that

. . . determinate intentions and rules are matters of knowing how rather than knowing what. We learn through interaction with others how to follow rules, including those we set for ourselves. When we “interpret” what we have intended with respect to situations to which we have not fully adverted – which situations exist for all intentions – we do not look for mental facts in addition to those we call the intention; rather, we just grasp, as we have learned to do, the full range of what we intended in the light of the actual mental state and its context.48

46 Alexander and Sherwin, Demystifying, 160.
The notion that we “just grasp” what we intended is crucial because we can’t possibly have explicitly thought-out intentions about all of the possible cases to which our words could be applied. Further, and importantly, our ability to do this is something that we learn with others. In a footnote Alexander and Sherwin approvingly sum up papers that show, for example, “correct application of a rule is the product of training rather than reflection,” “understanding rules is a matter of skill rather than intellectual fact,” “rule following is learned in a community,” and “the meaning of a rule is in its use in a form of life.”49 In other words, we understand what we mean by a word because we know what “one” in our interpretive community would mean in using it; we have an intuitive sense for the kinds of considerations which are relevant to the application of the term within certain contexts. Intentions are not formed in some private space far removed from others. We intend in ways similar to the people around us, people from whom we have learned (and continue to learn) how to use language. A younger Stanley Fish makes the point: “It is hard to think of intentions formed in the course of judicial or literary activity as one’s own, since any intention one could have will have been stipulated in advance by the understanding of what activities are possible to someone working in the enterprise.”50

As noted above, we can deliberately violate linguistic conventions if we try (by thinking, for example, “When I say ‘watermelon’ I will mean ‘cat’”), but this ability is only possible because we possess a background language with terms whose meaning are not up for grabs (at least, not all at the same time). The issue is not about actual authors and hypothetical authors; it is rather about the intentional actions people take, given a set of background norms and

assumptions about what those actions mean. Because we share language in such a robust way, we can know (or can have good reasons to believe) that particular speakers on particular occasions should have known how others would interpret their actions, and thus can be held accountable for what they knowingly led others to believe.

Varieties of Discrepancies Between Sentence Meaning and Speaker’s Meaning

The Semantic Intentionalists will be sure to point out that even if it is true that we intend the conventional meaning of a word when we use it, it is still the case that we intend the conventional meaning of the word, and thus their analysis survives. It is time to confront cases in which the appropriate interpretation of a text would be something other than speaker’s meaning, for only if such a case exists is there any practical problem with the Semantic Intentionalists’ position.

As we have seen, there can always be more than one sentence meaning for a sign or set of signs. Real-life cases in which there is a conflict over whether to privilege sentence meaning or speaker’s meaning will probably focus on a small range of sentence meanings – the meaning(s) which some set of persons thought they were justified in attributing to a speaker. When might there be a discrepancy between this small range of sentence meanings and speaker’s meaning?51

One might think that intentional deception is such a case, but in fact it is not. I could say “he went right” when I know someone went left, and say it with the intent that the person I address take me as having said (in normal English) “he went right.” This could be an outright lie, or prior to saying it I can think in my mind, “the next time I say ‘right’ I will mean ‘left’” in an attempt to see my action as “honest.” After all, if any sign can mean anything, why can’t I mean “left” when I say “right” on this particular occasion? But, if my intention is to deceive the other

51 This seems like the relevant question, so I forgo an extended analysis of all the logical possibilities in which discrepancies between sentence meaning and speaker’s meaning could occur.
person then my intention will have failed if the person somehow learns my “true” intention. As Alexander and Sherwin put it, “If we say ‘X’ and intend that our audience take us to have intended A thereby, then the meaning of our utterance is just A.” Speaker’s meaning is whatever I intend that the other person understand me as saying. Many of the so-called “secret meaning” concerns about Semantic Intentionalism seem to be cases of intentional deception.

But, consider cases in which there is no intended deception. For example, assume I sign a contract without reading its terms. Barring exceptional circumstances, I know that the other party will take me as having intended the sentence meaning of the terms (modified by what we can both be expected to know about the circumstances of agreeing to the contract) and will rely on that presumption as she structures her plans and goals. However, I have almost no idea what it says and can therefore the words on the page can’t have my intentional backing; I don’t have a specific semantic intention about any of them. The legally enforceable meaning of the contract will depend on what we both had reason to believe we were doing in agreeing to the contract - in Rosen’s words, our “intentions to change the legal score.” In this case at least one speaker is aware that a relevant group of people will understand him as meaning something other than his intended semantic meaning (of which, in this case, I have none).

Notice that this case does not completely do away with the requirement of intention. I still have to intend to sign the contract, and for the contract to be enforceable I have to have some rudimentary understanding of what it means to agree to a contract, ways in which my intention to

52 Alexander and Sherwin, Demystifying, 216.  
53 Ibid., 215-17.  
54 The distinction here is something like G.E.M. Anscombe’s distinction between intended effects and foreseen but unintended side-effects. See G.E.M. Anscombe, Intention (Ithaca: Cornell University Press, 1966), 89: “Something is voluntary though not intentional if it is the antecedently known concomitant result of one’s intentional action, so that one could have prevented it if one would have given up the action; but it is not intentional: one rejects the question ‘Why?’ in its connexion.”  
55 See §201 of Restatement (Second) of Contracts for a similar view.
agree is manifest, how this intention is morally or legally salient, and so on. However, the meaning of the contract is determined by what I and the other party understood ourselves to be doing, not on the semantic meanings we specifically attached to the words.\(^56\) Intention is still important, but semantic intentions do not necessarily establish the (legal or moral) meaning of the contract.

**Intention and Legislation**

What about legislation? Do people with the authority to make law sometimes make it even in the absence of having semantic meanings about the terms in the law? I answer yes, and very often due to the length and complexity of laws and number of persons necessary for proposed legislation to become law. Legislators will very often vote for laws without having actual semantic intentions about the meaning of many of their terms. Or, they might have semantic intentions about the meaning of particular words which are sufficiently different than the generally understood sentence meaning(s). In either case I claim that the meaning of the law is the sentence meaning which legal officials and the public justifiably attribute to the law due to the language, social practices, and special circumstances generally understood at the time of the law’s passage. My claim is not so much *ontological* (speakers *endow* marks with meaning), as that of the Semantic Interpretivists seems to be, but *moral*: we and others should be held to meaning X when we anticipate that others will understand us as meaning X, when the potential for misunderstanding is meaningful, and when we could reasonably clarify misunderstandings.

\(^{56}\) This is also true if someone else writes the contract (e.g., a lawyer). In that case, the meaning of the contract will track what I and the other person had reason to understand we were doing, not on what the author of the text intended when she wrote it.
When the moral stakes for utterances are sufficiently high, the appropriate interpretation of the utterance is the justifiably understood sentence meaning, not the speaker’s meaning.\(^{57}\)

Intentions are still relevant in identifying the justifiably understood utterance meaning, but not in the way that the Semantic Intentionalists think they are. Following Raz, I claim that legislators must intend to pass the laws which they pass, but that they need not have an understanding of the content of the legislation.\(^{58}\) They must simply intend that the proposed law under consideration become law, whatever its content turns out to be.\(^{59}\) And how can we (or they) know the content? Raz writes that laws should be understood according to “the circumstances of the promulgation of the legislation, and the conventions of interpretation prevailing at the time.”\(^{60}\) Much of the content of the law will be contingent; different legal systems can have different “default rules” or statutes of construction which can constrain or enhance the meaning of laws. Therefore, the very same words (such as “equal protection of the laws”) can have very different meanings depending on the background norms in which the law is passed.

For legislators to fulfill this requirement they must have sufficient knowledge of what it means to pass a law, the process by which they manifest their intention to pass a law, and so forth. This is a low bar, but one that can be failed. For example, if a legislator undergoes a

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57 This claim, of course, presupposes that laws are often (even paradigmatically) made through language use and that part of the authority of such (intentionally created) law comes from the fact that the legislator(s) intended to pass a particular law and not another; that is, at least part of the authority of a law comes from the fact that it was posited by a legitimate authority.

58 Raz, *Between Authority and Interpretation*, 284: “A person is legislating (voting for a Bill, etc) by expressing an intention that the text of the Bill on which he is voting will-when understood as such texts, when promulgated in the circumstances in which this one is promulgated, are understood in the legal culture of this country-be law. On this understanding the required intention is very minimal, and does not include any understanding of the content of the legislation.” Also, 283: “A suitably authorized person legislates by performing an action which expresses the intention that \(p\) become the law in virtue of that intention being manifestly expressed.”

59 For such affirmation to be meaningful the content of the law should be accessible to the legislator, at least in principle.

60 Raz, *Between Authority and Interpretation*, 288.
seizure just at the moment when it is his turn to vote on a bill and unintentionally says “aye,” giving what others interpret as the tiebreaking vote, the bill will not have been passed because the legislator did not intend to indicate approval of the bill.\footnote{\textit{ibid.}, 171.}

Contrast this view on the intentions necessary to pass a law with the Semantic Intentionalist view, which requires that all of the legislators intend the same meaning in order for a law to have meaning at all. Alexander and Sherwin are candid about the possibility that some law might fail to have meaning: “On some occasions, what appears to be meaningful law (because its text seems to parse) is actually meaningless.”\footnote{Alexander and Sherwin, \textit{Demystifying}, 171.} It would be meaningless if the individual legislators who voted for had significantly divergent semantic intentions about it, or would give different answers to questions about hypothetical or actual applications. But the probability of overlap in intentions in the strong sense required by the Semantic Intentionalists becomes, on average, less and less likely as more and more authors are required to create a text. There are often hundreds, thousands, or even millions of persons required to make a text legally binding law.

Alexander and Sherwin try to be optimistic about the prospects of their approach, saying “in many cases . . . the legislators . . . will all intend the same meaning for the rule they enact. In other words, over the range of real or hypothetical applications of the rule, felicitous and infelicitous, if asked how the rule was intended to apply, each member of the majority sufficient to pass the rule would give the very same answer.”\footnote{\textit{Ibid.}, 171.} Setting aside the issue that, on its face, this

\footnote{Other scenarios are also possible: what if legislators are given buttons to press to cast their votes, and one presses the “aye” button on accident, intending to vote “no”? Setting aside considerations of efficiency and formality (which can be substantial), I’m inclined to say that the legislator who made an honest mistake should have a chance to make it right. Perhaps, after a certain amount of time, it would make sense to not allow a legislator to recast a vote, but this seems more like a practical concern than a principled one.}
seems like a wildly demanding standard to meet, Alexander and Sherwin do not address what seems like the obvious objection: what if some of the legislators don’t have actual semantic intentions about some parts of the legislation they vote for? That is, what if the people who authorize the law do not have intentions about the meaning of its terms when they authorize it?

There can be only three responses for the Semantic Intentionalists: first, and most likely, the law has no single meaning because the “authors” necessary to make the proposed legislation law did not have specific semantic intentions about the meaning of its terms. Taking this position will probably lead us to discard most empirical legislation (see below).

Second, the law could mean what the drafters of the law (as opposed to all legislators needed to pass the law) intend in writing it. The Semantic Intentionalists could take this route, but it seems a strange fit. In this case, the meaning of a legislator’s vote would essentially be, “I hereby ratify the speaker’s meaning of the drafters.” But distinguishing between “drafters” and “legislators” is very problematic. If a legislator reads the proposed legislation before voting on it and attaches semantic meanings to the words, does he thereby become a drafter? Put differently, when there is a disagreement about how to apply the law, which of the following groups of legislators should be consulted as to the meaning of the law: those who actively drafted the law, those who made minor contributions, those who offered suggestions, those who read the complete law, those who read summaries of the law, those who only talked about it with other legislators or lobbyists, and those who simply didn’t know anything about it? Of course, the votes of each legislator count the same in making the proposed legislation law. As with contract case, it seems that the meaning of the law should be interpreted not just on the basis of what a small group of drafters intended to communicate, but on the way the legislators and the public understood the law to changing the legal and political status quo.
Third, the meaning of the law could be what the legislators would have meant by the law if they knew what it said. However, even if this is done in good faith, and even if the legislators had memories which would allow them to do it accurately, it seems that the Semantic Intentionalists would shy away from this solution. The law seems to suffer from a deficit of actual intentions; it is not “backed up” by the intentions of those who endow it with legal authority. This solution reeks of hypothetical authorship.

With solutions two and three out, the Semantic Intentionalists must opt for one – that the law has no single meaning. This is a solution with unfortunate consequences. Lack of overlap about the meaning of the law seems highly likely in an age in which legislation is so complex and technical that legislators probably don’t read, let alone have semantic intentions about, many of the laws they vote for. Consider the “Patient Protection and Affordable Health Care Act,”\(^{64}\) signed into law by President Obama in 2010. At over 900 pages it is unlikely that more than a few, if any, of the actual legislators read and had specific semantic intentions about every aspect of the Bill. Unless a legislator was heavily involved in the drafting of the Bill she probably just read selected passages and voted for the Bill on the basis of considerations other than the full text. On the Semantic Intentionalist view it would seem that the bill fails to have a single meaning, or more precisely, that the bill is not meaningful law because the people whose intentions matter in creating its legal meaning (the legislators) did not have intentions about its terms. Whether or not laws have a speaker’s meaning is, strictly speaking, an empirical question, but the odds for meaningfulness don’t seem very good from where I sit. With regards to the U.S. Constitution, Larry Solum reviews the possibility of whether there could have been a speaker’s meaning for the original U.S. constitution and concludes that “the success conditions for

\(^{64}\) HR 3590.
[speaker’s meaning] were not met when the United States Constitution was proposed, ratified, and implemented.”65 Something similar can probably be said for most law which is created by large legislative bodies.

But, at one point Alexander and Prakash raise the question of whether “we are better off with more legislation rather than less.”66 We may be better off with less legislation than we currently have, but maybe not with none at all. As the length and complexity of proposed laws increase, and as number of legislators necessary to pass a law increases, there is a greater and greater chance that there will not be the overlap in intentions that the Semantic Intentionalists require for the law to have a meaning.

“Living Originalism” and What it Means to Follow the Text

But even if I am right, which of the various sentence meanings is the appropriate one for citizens, government officials, and legal officers to follow? In this section I engage Jack Balkin’s views about U.S. Constitutional interpretation in his recent book, Living Originalism. The dialectic with Balkin will be useful because, unlike the Semantic Intentionalists who rest too much on speaker’s meaning, Balkin puts an over-emphasis on a certain kind of sentence meaning. The right interpretive approach lies somewhere in the middle.

Balkin does not explicitly distinguish between sentence meaning and speaker’s meaning but rather sketches five categories of meaning: “(1) Semantic content (‘What is the meaning of this word in English?’); (2) practical applications (‘What does this mean in practice?’); (3)

purposes or functions (‘What is the meaning of life?’); (4) specific intentions (‘I didn’t mean to hurt you’); or (5) associations (‘What does America mean to me?’).” Balkin does not flesh these categories out as much as one might like, and in many cases it would seem that there is overlap between the categories (see below). However, it is crucial to his approach that “semantic content” (basically, what one finds in the dictionary) be discernible and distinguishable from the other kinds of meaning.

According to Balkin, there are two steps of constitutional interpretation: first, “ascertainment of meaning.” The “meaning” spoken of here is semantic meaning, the only meaning which interpreters are obligated to follow. Where the text gives determinate rules (such as that a president must be at least 35 years old, or that each state have two senators), the determinate rule must be followed. However, Balkin argues that in many cases the text gives open-ended principles which effectively delegate to future generations the authority to decide constitutional meaning. This leads to the second step: “constitutional construction.” When the text does not give determinate rules, future interpreters have the responsibility to flesh out the meaning of whatever principles or standards are contained in the text. We must follow the broad concepts referred to by the principle, but we do not have to follow the “original expected applications,” or the way that the people who wrote the text would have applied it. The authors of the text deliberately chose vague language because they wanted something other than a determinate rule; we should not make the text more determinate than it actually is. Fidelity to the constitutional text means taking the broad and ambiguous phrases for what they are: open-ended

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68 Ibid., 4.
69 Ibid., 13.
70 Ibid., 4.
71 Ibid., 13.
delegations of power to future generations. We must follow “text and principle,” which means filling out the principles where necessary.

Unfortunately, Balkin is not terribly clear about how to accomplish the first stage of interpretation, “ascertainment of meaning.” We have seen that “semantic content” is the answer to the question, “what is the meaning of this word in English?” Balkin complicates this relatively simple question by conceding that the context of an utterance can change its meaning: “We also want to know if words in the clause were understood nonliterally—for example, as a metaphor or a synecdoche—and we want to know whether some words referred to generally recognized terms of art.” Simply look up words in the dictionary will be insufficient, in some cases, because the meaning of the words would include contextual information about what those words were doing in the text. A phrase which, at first glance, looks like a broad delegation of power to future generations might not be.

For example, consider Section I of the Fourteenth Amendment. Balkin claims, with apparent ease, that the words “equal protection” in 1868 [the year the text was ratified] “meant pretty much what they mean today.” It is probably true that the dictionary definitions of “equal” and “protection” are the same today as they were in 1868, but even on Balkin’s account we cannot end the inquiry here. We must first know if the words were used non-literally or as terms of art. Balkin claims that they are not, but Michael McConnell, after digging through an impressive quantity of historical materials, believes they are: “Section One of the Fourteenth Amendment was drafted in technical legal language and was little discussed. Few ordinary

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72 Ibid.
73 Ibid., 105.
citizens could have had much of an idea what it meant.” This claim is controversial, to be sure, but the fact that at least one thoughtful observer believes it to be true requires us to take the history much more seriously; a simple search for semantic meaning will not suffice. If this claim or others like it is true, then “purposes or functions” and “specific intentions” (Balkin’s categories) must sometimes be part of the meaning that interpreters are obligated to follow, even when they are not explicitly stated in the text. The constitutionally relevant meaning of the words cannot be divorced from the context in which they were created.

Balkin also undermines his claim that interpreters are only bound to semantic meaning by his distinction between “fidelity,” which has to do with the semantic meaning of the Constitution, and “institutional responsibility,” which prescribes “how a person in a particular institutional setting-like an unelected judge with life tenure-should interpret the Constitution and implement it through doctrinal constructions and applications.” Balkin argues that much confusion is generated by treating these issues in the same way. I completely agree, but am left to wonder: what do we gain by understanding the semantic meaning of constitutional phrases alone, in the absence of a theory of institutional responsibility? We can know what “equal” means and what “protection” means, but without understanding the generally understood (but often unstated) assumptions about how the various branches and offices created by the Constitution would function, as well as how the framers of the language believed that they were enabling and constraining future generations to act (again, much of which is unstated), what have we gained by looking the words up in the dictionary? Are police officers, legislators, district court judges, and citizens all equally empowered to implement their understanding of what

“equal protection” grants? Presumably not, but nothing in the semantic meaning of “equal” and “protection” will yield this conclusion. We must know the location and function of the words within the overarching constitutional order.

It would seem, then, that on Balkin’s own account history and structure must play larger roles in the interpretive process than he sometimes grants. He does agree that the other “forms of meaning may be quite relevant pieces of evidence of original semantic content” 76 and that historical evidence can “resolve ambiguities in original semantic meaning.” 77 However, the line between “ascertainment of meaning” and “constitutional construction” can be hazy. At the construction stage Balkin argues that history can function as a “resource,” 78 a modality of constitutional argumentation which can be used to persuade others that one’s interpretation is correct (but not binding). But knowing when history functions as a “command,” because it falls under the first stage of interpretation, and when it functions as a “resource,” because it falls under the second stage of interpretation, is never quite clear. From what we have already seen the search for the legally (or constitutionally) relevant meaning will often include much more than semantic meaning. Understanding semantic meaning is a necessary condition for deciphering constitutional meaning, but, by itself, it is never a sufficient one.

The real danger with view like Balkin’s is that it fails to distinguish the authority that is created by the explicit consent of the people with other sorts of authority, such as the authority of morality or tradition or prudence. For a “delegationist” view such as Balkin’s, a few scattered clauses become the justification for vast bodies of case law 79 which have, at best, a tenuous claim to being chosen by the people. This wouldn’t be a problem if the courts would simply admit that

76 Ibid., 13.
77 Ibid., 228.
78 Ibid., 229.
79 The problem could also arise with law made by the executive and legislative branches.
their decisions have little to do with what the people have chosen, but instead, courts consistently say things like “provision X of the Constitution requires” such-and-so, opportunistically taking advantage of the fact that “the Constitution” is understood to be the product of popular sovereignty. A theory of Constitutional meaning and textual authority should be able to distinguish between cases in which the judges (or other legal officials) are acting to carry out the expressed will of the people and when they are relying on other forms of authority. Balkin’s view cannot adequately distinguish these cases.

The (Modified) Mischief View

My own view seeks to identify the scope of the authority granted when “the People” (or, more broadly, the persons authorized to make law) explicitly consent to making a proposed text law at a particular moment of time. To do so, I begin with four aspects about law which, though simple, are often overlooked or not sufficiently appreciated in discussions of the meaning of the U.S. Constitution:

1) The temporal aspect of law: Human-made laws (including the U.S. Constitution) come into being at discrete moments of time. There is a period of time prior to the enactment of law, the time when the law is passed, and then a period of time in which the law is in force. Changes in society may prompt people to pass new laws (e.g., “standards of decency” may be “evolving”), but those changes do not have the force of law until appropriately situated individuals incorporate them into the body of the law, at a particular moment of time.80

80 It may be, as H.L.A. Hart argues, that law is whatever legal officials recognize as law. The view I advance can be made compatible with this view – it would still be possible, in principle, to identify the point in time at which a sufficient number of legal officials began treating something as law, therefore making it law. For Hart’s view, see H.L.A. Hart, The Concept of Law (Oxford: Oxford University Press, 1961), 100-102.
2) The positive aspect of law. What distinguishes the authority of positive law from other kinds of authority is that the appropriately-situated people consent to making proposed legislation law. Whatever other authority a directive a may have (moral, prudential, self-interested, traditional, etc.), it is not “law” unless the right people consent to it.\footnote{John Finnis speaks of the “double life” of the law – on one hand, “law” is a social fact of power and practice; on the other, “law” informs people’s practical deliberations about how they should act. When I speak of “law” in this paper I primarily refer to the first, sociological sense – law a set of intersubjective practices. See John Finnis, “On the Incoherence of Legal Positivism,” \textit{Notre Dame Law Review} 75 (2000): 1597-1612, 1602-3.} Judges and others should not always follow the law, but it remains law (in a sociological sense) unless it overturned or discarded. Law based on custom can also be said to come into being due to the authoritative action of individuals: the custom does not become law until the authoritative individuals recognize it as law.\footnote{By the time they do, there may be very strong (legal) reasons for recognizing the custom as law.}

3) The linguistic aspect of law. Law is expressed in words. The words used in a law have a meaning (or a limited range of meanings) at the time they are enacted, and this is the meaning which bears the explicit approval of authority-granting individuals. No other meanings have the same claim to the explicit consent of the authority-granting individuals, and therefore no other meanings have the same claim to being “law.” Think of it this way: Word X has meaning A at the time it was enacted in a statute, and meaning B at some time in the future. Meaning A was agreed to by the authority-granting individuals. By historical accident, meaning B attached itself to word X over time. Whatever authority meaning B has, it is not the authority that comes from being explicitly consented to by the relevant lawmakers.
4) **The settlement aspect of law.** A primary function of law is its *settlement function*. Law aids government officials and citizens by narrowing the range of practical considerations which would be required by independent moral judgment, and, under certain conditions, instructs them to only consult the law. That certain practical and moral considerations should be ignored may sound amoral, but in fact it is motivated by moral concerns: law reduces the confusion and conflict which would result in social interaction if there were no way to definitively “settle” legal and moral controversies. Law provides closure around which individuals can structure their lives and plans. Of course, present settlements are open to future revision, but they remain “law” until changed. Often an imperfect settlement which everyone recognizes as authoritative is superior to the ongoing and intransigent conflict which would otherwise result if everyone had to apply the full range of moral considerations every time the issue came up.

It bears repeating that in this paper I do not advance a full theory of *adjudication*; that is, a theory about how judges should act given a certain body of positive law. My purpose is to articulate the grant of authority created when “the People” explicitly consent to a set of textual provisions at a particular moment of time. Of course, I am here speaking of law in the “sociological” sense, as an intersubjective set of practices which identifies certain directives as legally binding and others as not. I do so to highlight the *particular authority* which is created when the people explicitly consent to create a new law. To do so, we must keep in mind that laws are made *at a particular moment of time, by persons with the appropriate authority, with words, in order to resolve or settle controversies.*

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These premises lead to a certain view about the authority created by a law: the authority of the (positive) law derives from the intentional action of the lawmakers and should be interpreted according to the problems they were attempting to resolve. When we interpret laws (and constitutional provisions) in this way, we are within the scope of authority created by the intentional selection of text at a particular moment of time; if we go beyond this, we are relying on some other form of authority.

This is where the “Mischief Rule” comes in. This rule is a rule of statutory interpretation in English law which is usually traced back to Heydon’s case, decided in 1584. In the course of resolving a relatively banal controversy over tenancy, the esteemed Lord Coke wrote:

“For the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered:

(1st). What was the common law before the making of the Act?
(2nd). What was the mischief and defect for which the common law did not provide.
(3rd). What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth. And,
(4th). The true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy . . .”

Of course, there are many technical aspects of the way Lord Coke states the rule (having to do with the relationship of the common law and Parliament, etc.) that we need not get bogged down in. Leaving aside such technicalities, we can abstract three questions we should ask in the course of interpreting statutes and other positive laws: 1) What was the legal status quo prior to the making of the new law? 2) What was the problem which the lawmakers were attempting to solve when they created the new law, which was not adequately addressed in the legal status quo? 3)

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What remedy did the lawmakers choose to resolve that problem, and what is main purpose (the “true reason”) of the remedy?

This approach has many advantages. By focusing on the publically known context of the law’s enactment, it takes the intentions of the lawmakers seriously without falling into the errors of the semantic intentionalists. The focus of interpretation is on what a reasonably-well-informed individual could understand the law to be accomplishing when it was passed – what problem or problems did it solve, and how did that resolution “fit” into the broader network of laws and regulations of which it was a part?

This leads to another advantage, one which is relevant for Balkin’s view. Recall that for Balkin, interpreters are only bound by the “semantic meaning” of the text. In other words, Balkin believes that relevant meaning of certain constitutional provisions can be understood without recourse to virtually any contextual data. But surely this view is mistaken. As Balkin concedes at many points, the dictionary definition of words simply will not reveal the legally relevant meaning of words because those words will have been taken out of context. To understand the words, we have to understand what the words were doing when they were added to the law – what did their addition to the body of law accomplish? The answer to that question will reveal the relevant meaning of the passages.

Now, it is conceivable that the purpose of certain clauses of the constitution was just what Balkin thinks it is – to delegate authority to future generations to define what “equal protection” or “due process” really mean. If so, this must be established by historical research for each provision for which it is asserted, rather than assumed because of the structure of a particular passage. Even though certain words may look like they instantiate a broad principle, they might not, due to the context of enactment and the reasons the lawmakers had for including the words
in the law. Keith Whittington uses the following example to make the point. Imagine that a father tells his children to “act fairly” right as they sit down to take an exam. Under such circumstances, “it is likely that the text was meant to be a specific warning against cheating.” However, if “the father whispers it to his children from his deathbed, then it is rather more likely that the text was meant to be a general principle for life.” The general point to be made is that “the text ‘by itself’ is indeterminate. We cannot know what the father meant by ‘acting fairly’ without a great deal more information about the context of the utterance.”

Lastly, by focusing on the problems the lawmakers were trying to solve and the remedies they selected to solve them, the Mischief Rule is attentive to the authority that comes from the lawmakers. A longstanding controversy in U.S. Constitutional interpretation is over the level of abstraction at which to understand the “majestic generalities” – phrases such as “equal protection” and “freedom of the press.” Should they be understood narrowly (according to what the Founders thought they meant) or expansively (according to what some people think they mean today)? The Mischief Rule answers this controversy by asking what the lawmakers accomplished in each instance. In requiring that no state “deny to any person within its jurisdiction the equal protection of the laws,” were the framers and ratifiers of the Fourteenth Amendment intending to delegate broad authority to future generations to work out, as best they could, the meaning of “equal” and “protection?” If so, who was authorized to implement their own understanding of these words – police officers, legislators, judges, citizens, or others? How broad did this authority extend? Could the Fourteenth Amendment be used by judges to strike down the requirement that each state have two senators, since surely this arrangement dilutes the voting power (and thus equal protection) of people in populous states? If not, why not?

In the case of Section I of the Fourteenth Amendment, it is relatively clear that there were certain problems it was definitely designed to solve. Foremost among them was the preservation of the Civil Rights Act of 1866, which many thought could not be authorized on the basis of the unamended Constitution. Of course, those in favor of reading Section I broadly will respond that the text itself does not mention the Civil Rights Act and uses very broad language; it does not specify a definite list of rights to be protected. This is true, but that does not mean we can understand the meaning of the law without understanding how Section I fit into the existing constitutional order. When we hew close to the problems the creators of the law thought they were solving, we can be confident that we are in fact acting in accordance with the authority they granted in creating the law. The further we get from such problems, the more we rely on other forms of authority, such as prudence, doctrine, or fairness.

Another way this debate plays out is by asking whether certain words in the Constitution refer to objective truths or merely what the founders thought about particular subjects. For example, when the Constitution speaks of “equal protection” or “cruel and unusual punishment,” should we understand the words according to the moral truths to which they refer, or only according to what the people who created and ratified the text thought they meant? McGinnis and Rappaport argue that in certain cases, we should understand the Constitution to refer to objective truths. If people in 1786 thought that many kinds of metals counted as “gold,” but subsequent scientific analysis revealed that only some of them held the properties which made “gold” valuable, McGinnis and Rappaport argue that we should interpret “gold” according to the most recent scientific understanding. However, they believe that this same approach should not be used with moral truths because the risk-averse founders would have been more confident in

their own judgment and would not have wanted to delegate so much policy discretion to future interpreters.\textsuperscript{88}

In contrast, I argue that the legally authoritative meaning of the text should always be understood according to the standards and conventions of the people who created it. Consider again the example of “gold.” Assume that, in 1786, Americans were very confused about what “gold” was, and that science would later come to conclude that 99% of what people in 1786 took to be “gold” was not actually “gold,” but some other substance. Would it be accurate to say that a state would be in violation of section 10 of Article I of the Constitution (“No State shall . . . make any Thing but gold and silver Coin a Tender in Payment of Debts . . .”\textsuperscript{89}) if it continued to use as “gold” what everyone in 1786 would have recognized as “gold?”\textsuperscript{90} Calling such action “unconstitutional” would hardly be an indication that “the People” had chosen to prohibit it. As Keith Whittington puts it with regard to moral truths, “It is possible to justify prioritizing objective moral concepts over the subjective intentions of particular legislators, but such a theory cannot be regarded as drawing on founding intent at all and must make its case for abandoning that dimension of constitutional fidelity directly.”\textsuperscript{91}

Recall that the relevant question here is what it means to appeal to the text of the Constitution as the authority for one’s actions. The only meaning of the Constitution which was

\textsuperscript{89} U.S. Constitution Article I, section 10, clause 1.
\textsuperscript{90} Saul Kripke, \textit{Naming and Necessity} (Cambridge: Harvard University Press, 1980) provides a classic discussion of this problem; see pp. 116-126 and 134-140. Kripke believes that terms like “gold” have their references fixed, at least initially, by a sort of ostensive definition: “Gold is the substance instantiated by the items over there, or at any rate, by almost all of them.” (135) Further investigation and observation can lead to a refinement of the category or to a recognition that the initial sample included more than one substance: “If, on the other hand, the supposition that there is one uniform substance or kind in the initial sample proves more radically in error, reactions can vary: sometimes we may declare that there are two kinds of gold, sometimes we may drop the term ‘gold.’” (136) In my view the law binds according to the general understanding of the time when the law was passed, for that is the understanding which was available to the lawmakers and subjects of the law.
\textsuperscript{91} Whittington, “Dworkin’s ‘Originalism,’” 221.
ever consented to in a formalized way by We, the People, is the publically understood meaning of the text at the time of the text’s ratification. It is what reasonably well-informed people understood the lawmakers to accomplish when they added the new text to the existing body of law. Other meanings which accrue to the words over time do not share the explicit consent of the people. Whether or not the text does grant broad leeway to construct principles will be a function of the text’s place within the institutional practice when it was created.

Conclusion

Laws should promote justice. But whether they do or not in any particular case is a matter of social, historical, and linguistic fact. The meaning of a law is what its lawmakers accomplished when they passed the law, and the meaning of that accomplishment can be discerned on the basis of the prior state of the law and the resolution the lawmakers chose to solve a particular problem. The authority of positive law is limited, but it is real. It is also distinct from other kinds of authority.

As we have seen, the explicit consent of the people, expressed in legal texts, is perhaps the least controversial justification that legal and political actors give for their actions. Whereas the semantic intentionalists seek to draw too much meaning of the text, Balkin reads out much of the contextual information which makes the text what it is. The Mischief Rule strikes the right balance by asking what problem the new law solved, interpreting meaning in accordance with context and function. Adopting such an approach might not allow one to get all of one’s favorite conclusions, cases, and preferences out of the law, but an approach which cannot fail to achieve one’s preferred moral outcomes seems of little use in restraining political actors.
Chapter 3: Judicial Excellence after Earl Warren

Judging the performance of Supreme Court justices is a tricky business. Nearly everyone would agree that the justices should enact “Equal Justice Under Law,” the motto inscribed on the U.S. Supreme Court building, but what exactly does it mean to do this? Should the justices seek to achieve the best resolution of a controversy from an abstract perspective, or follow the letter of the law as closely as possible? Should justices be praised for judicial activism or judicial restraint? When (if ever) should justices allow “political” considerations to influence their decisions? Not only are the justices expected to instantiate a variety of values simultaneously (some of which cut against each other), but there is disagreement both about which values should be instantiated and which ones carry the most weight. How does one adjudicate among the competing values and perspectives to come up with a standard for good judging?

The difficulty of quantifying judicial excellence has not stopped observers of the U.S. Supreme Court from trying; various lists of “all-star” Supreme Court justices have been complied and debated. Such lists provide more than mere idle entertainment: the selection of particular justices as exemplars serves aspirational and pedagogical functions within the legal community. Rather than focusing on abstract theoretical questions, the “canonization” of a particular justice reminds lawyers, judges, and academics of our highest ideals and how a particular judge, at a particular moment in history, actualized those ideals. No justice is perfect,

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1 I would like to thank Keith Whittington, Stephen Macedo, Paul Frymer, Robert George, and participants at the Princeton Political Theory Graduate Research Seminar for comments on various versions of this paper.


of course, but selecting certain justices as exemplars provides a useful standard to judge other justices against.

This paper is about how the canonization of Chief Justice Earl Warren changed the standards by which judicial excellence is gauged. Warren has been both praised and vilified since the day he announced a unanimous decision in *Brown v. Board of Education*,\(^4\) but in polls of experts he consistently ranks among the top Supreme Court Justices in history (see below). Warren is esteemed for his leadership, his statesmanship, and most of all, for the results he achieved. However, Warren and the Warren Court\(^5\) were unconventional in many respects. I argue that Warren’s performance changed the standards we use to evaluate judicial excellence in the many ways. His bold defense of individual liberties led to a recalibration in the values that Supreme Court Justices were expected to instantiate. Judicial craftsmanship and reliance on precedent, history, and doctrine, were deemphasized while the pursuit of ethical ideals, informed by a certain reading of the text, became central concerns of judicial performance. Further, Warren’s judging, combined with a strong conservative backlash, gave rise the contemporary categories which dominate the discussion about constitutional interpretation: “living constitutionalism” and “originalism,” and led to a heightened sense of concern about “judicial activism.”\(^6\) This change in vocabulary, as well as a change in standards used to evaluate Supreme Court justices, is an enduring legacy of Warren and the Warren Court.


\(^5\) For the purposes of this paper I will use “Warren Court” to denote the decisions and style of judging which are generally associated with Warren’s leadership on the Court. Warren does not bear all the responsibility for the actions of the “Warren Court,” but most observers, sympathetic and critical, associate Warren with the general turn toward individual civil rights, as well a relatively “unconstrained” style of judging, which occurred during Warren’s tenure.

The paper will proceed as follows: first, I review scholarly surveys of judicial excellence and discuss the various criteria which have been used to judge the performance of Supreme Court justices. I then list some of the qualities for which Earl Warren is widely admired and respected. I then detail how almost all observers concede that Warren was not particularly interested in judicial craftsmanship; he was primarily interested in achieving the right results. Despite Warren’s disregard for conventional norms of legal reasoning, I show how the innovations of the Warren Court were synthesized into the “tiers of scrutiny” jurisprudence which underwent great development during the Warren years. I conclude with some observations about how Warren’s example led to a change in the terms used to discuss constitutional interpretation and the role of judges.

**Judicial Excellence**

Criteria for judging Supreme Court justices are not lacking; indeed, the problem in evaluating judicial performance is not too few standards, but too many. In 1964 George R. Currie gave three criteria for judging justices: “Overall ability, prophetic vision, and judicial statesmanship.” The limitation of criteria to three, however, is not entirely candid, since “overall ability” includes many aspects: “One of its many facets is the capacity to rise above prior political or economic views and associations and to decide a pending issue objectively. Another is the power to persuade and influence colleagues on the bench. Others are the power to reason logically and then to express in effective judicial writing not only the conclusions reached thereby, but also the bases upon which these are grounded.”

Reflecting on a survey of legal categories of “originalism” and “living constitutionalism” become legally salient in a new and powerful way with the rise of the Warren Court. As I show below, justices prior to (and even during) the Warren Court did not define themselves in these terms and felt free to use originalist and non-originalist justifications for their decisions. The Warren Court made the choice between these interpretive approaches seem unavoidable.

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experts conducted in 1970, William D. Bader and Roy M. Mersky give the following list of judicial desiderata: “scholarship; legal learning and analytical powers; craftsmanship and technique; wide general knowledge and learning; character, moral integrity, and impartiality; diligence and industry; clear, logical, and compelling communication skills; openness to change; courage to take unpopular positions; dedication to the Court as an institution and to the office of Supreme Court justice; ability to carry a proportionate share of the Court’s responsibility in opinion writing; and statesmanship.”

Another list based on survey data included “judicial restraint, judicial activism, enhancement of the Court's power, protection of individual rights, length of service, impact on the law, impact on society . . . protection of societal rights, dissent behavior, and personal attributes” as bearing on the determination of judicial excellence. Even more recently, empirical scholars have sought out “objective” criteria which quantify judicial acumen. Steven Choi and Mitu Gulati suggest measuring variables such as citation rates (by other judges and by academics), inclusion of opinions in casebooks, speed and disposition of cases, willingness to disagree with other judges nominated by the same party, and so on, in a hypothetical “tournament of judges” to determine the best candidate for a judicial position.

With so many criteria to be applied it is a wonder that we think highly of any justice at all. But perhaps focusing on criteria first has it backward. Perhaps we do not come to regard

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10 Prior to these articulations of judicial greatness, Justice Felix Frankfurter gave a more poetic account of what makes a great judge: “greatness may manifest itself through the power of penetrating analysis exerted by a trenchant mind . . . it may be due to persistence in a point of view forcefully expressed over a long judicial stretch . . . it may derive from a coherent judicial philosophy, expressed with pungency and brilliance, reinforced by the Zeitgeist . . . it may be achieved by the resourceful deployment of vast experience and an originating mind . . . it may result from the influence of a singularly endearing personality in the service of sweet reason . . . it may come through the kind of vigor that exerts moral authority over others.” See Felix Frankfurter, “The Supreme Court in the Mirror of Justices,” University of Pennsylvania Law Review, 105 (1957): 781-796, 784.
justices as great because they conform to some list of pre-established standards, but rather we recognize certain standards as relevant and important because of the way a particular justice embodies them. Though there are certainly feedback effects no matter how one goes about the investigation, it may simply be easier to point to the great justices of the past than it is to think in the abstract about what would make a great justice. And it turns out that this is the case – there is a fair degree of consensus among observers about which justices are the truly great ones.\(^\text{12}\) John Marshall – “the great Chief Justice” - is almost universally acknowledged as an excellent justice for his role in defining the contours of the national government, strengthening the prestige and power of the Court, and his nearly unmatched judicial intellect.\(^\text{13}\) Louis D. Brandeis and Oliver Wendell Holmes, Jr.\(^\text{14}\) also generally rank high in surveys of legal academics and practitioners.\(^\text{15}\) Though resisting overt definition, perhaps judicial excellence is something one knows when one sees it.

Earl Warren tends to come out well in surveys of judicial excellence. In 1970 Albert P. Blaustein and Roy M. Mersky asked “sixty-five law school deans and professors of law, history, and political science who deal with constitutional law” to rate all Supreme Court justices up to 1969 as “great,” “near great,” “average,” “below average,” or “failure.” The respondents were given no criteria by which to judge the justices. Earl Warren, having just retired, was classified as “great,” as were eleven other justices.\(^\text{16}\) In 1993 Mersky and Blaustein conducted a similar

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\(^{14}\) Bader and Mersky, *The First One Hundred Eight Justices*, 30, refers to Marshall, Brandeis, and Holmes as “the three greatest justices.”

\(^{15}\) The esteem accorded to the justices came suddenly but has remained strong for nearly three quarters of a century. See G. Edward White, “The Canonization of Holmes and Brandeis.”

\(^{16}\) Albert P. Blaustein and Roy M. Mersky, “Rating Supreme Court Justices,” *American Bar Association Journal* 58 (1972): 1183-89. The results were listed chronologically, so it is hard to tell exactly where Warren fell within this
survey in which Warren placed fifth overall, behind only Marshall, Holmes, Brandeis, and Joseph Story. In 1989 Robert C. Bradley asked scholars, judges, attorneys and students to “list and rank order ten Supreme Court justices who you consider as great.” Similar to Blaustein and Mersky, Bradley did not supply the respondents with any criteria to evaluate justices. Overall, Warren came in as the third greatest justice in history (behind Marshall and Holmes), though his standing varied according to the various groups surveyed. Scholars ranked him third; judges fifth; attorneys sixth; and students fifth.

Clearly, there is a general recognition among observers in general and members of the academy in particular that Warren was among the very greatest justices in Supreme Court history. How does Warren’s presence in the Parthenon of Supreme Court Greats affect the standards used to evaluate justices? What did he bring to the list of “greats” which was not already there? In addressing this question we need to recognize that the relative weights of the values we expect justices to instantiate can change over time. The example of a particular justice can alter our expectations about what is truly important and what is merely peripheral in judicial service.

Consider an analogy: in a discussion of how standards within a social practice change over time, Jeffrey Stout references soccer great Franz Beckenbauer to show how “great ones” change the standards we use to evaluate greatness: “One thing that counts in favor of Beckenbauer’s greatness is the way in which his play as a defender transformed the standards by

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17 See William G. Ross, “The Ratings Game,” appendix 1. Ross alleges that Mersky and Blaustein conducted the 1993 survey, and gives the results of the survey, but I cannot find the original publication by Merskey and Blaustein.
which defenders have subsequently been judged. The standards changed in response to specific features of Beckenbauer’s play—his skill as a passer, his ability to join the attack without weakening the team’s defensive configuration, and so forth."19 Beckenbauer did not simply fit into a preexisting mold of what a defender should do, but rather showed the soccer world a new way of playing the game. Until Beckenbauer showed the soccer world that such play was possible, defenders were held to a different standard. After Beckenbauer, defending in the old way would not be enough—a player in Beckenbauer’s position had to be able to lead the attack without compromising defensive integrity, and so forth. Beckenbauer’s play was so creative and successful that he changed the standards by which all future players would be judged.

The same can be said of particularly influential justices, such as Earl Warren. Warren showed a generation of lawyers, academics, and judges what the Supreme Court could do in the name of equality and civil rights. Against the backdrop of Warren’s example, the evaluation of Supreme Court justices would never be the same. The brilliant but reserved judging style of a justice such as Felix Frankfurter simply did not have the same appeal when it is set next to Warren’s bold pursuit of civil liberties. (Indeed, next to Warren’s example Frankfurter can be called “one of the great disappointments of modern times.”20) Could a justice, after Warren, be content to simply follow the case law and avoid constitutional controversies where possible? Are the “passive virtues”21 really virtues at all, given the great strides toward justice which the Warren Court achieved? Why would a justice after Warren settle for anything less than justice? Warren’s influence on judicial evaluation, then, will lie not only in what he is admired for but

also in the way that certain values came to be seen as less important because of his example. We will examine both aspects of his influence in turn.

**The Case for Warren’s Greatness**

To his admirers, Warren embodies at least three qualities which set him apart as one of the greatest justices of all time: charismatic leadership, statesmanship, and the will to bring about just results. Warren’s leadership on the Court, particularly in *Brown v. Board* and the other desegregation cases, is truly incredible. Legal historian Michael Klarman writes that prior to Warren’s arrival on the Court the very outcome in *Brown* was in question. Klarman estimates that only four members of the pre-Warren Court (Hugo Black, William O. Douglas, Harold Burton, and Sherman Minton) were strongly inclined to strike down racial segregation in public schools as unconstitutional.\(^{22}\) A unanimous decision to desegregate public schools was unthinkable. After Warren arrived in 1953 he relentlessly sought to persuade his colleagues to join a unanimous decision against school segregation. With Warren’s arrival the outcome of the case was no longer in question, but a divided Court could make it easier for Southern states to resist the Court’s orders. In conference with the other justices Warren framed the question as one of attributing racial inferiority to blacks and eventually won over the justices who thought the decision might be interpreted as a political move. In the end Warren achieved unanimity and authored the most celebrated decision of the 20\(^{th}\) century. Warren maintained this unity in the string of desegregation cases that followed, and for this (as well as other accomplishments) he is rightly regarded as one of the greatest leaders the Court has ever had.\(^{23}\)

\(^{22}\) Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (Oxford: Oxford University Press, 2004), 298; see also 292-312.

Second, Warren is believed to be one of the greatest statesmen in this history of the Court, second only (perhaps) to John Marshall. Bernard Schwartz writes that on the Supreme Court, “the judge must be even more the statesman than the lawyer,” and argues that Warren was clearly this. A judicial statesman takes a broad view of history and politics has a keen appreciation for how the decisions of the Court will be received in both law and in society. A judicial statesman not only keeps pace with social change but seeks to influence its direction. A judicial statesman perceives the institutional possibilities for using the power, and deftly pursues those possibilities in the name of justice and the common good.

Warren’s statesmanship is manifested in the way his decisions have become monuments of principle for American identity. Decisions such Brown v. Board and Miranda v. Arizona are so well-known and celebrated that they have become a permanent part of America’s collective memory. Though the promise of such declarations was not immediately fulfilled (indeed, Southern “massive resistance” delayed racial integration in public schools for more than a decade), the promise of such principles was arguably an important element in the story of how such injustices were eventually combatted in a more direct way. Warren marshaled the prestige and power of the Court to combat the injustices he saw, and history seems to have borne out many of his most important contributions.

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26 Bickel seems to have gotten it wrong when he wrote, “If my probe into the near-term future is not wildly off the mark, therefore, the upshot is that the Warren Court’s noblest enterprise—school desegregation—and its most popular enterprise—reapportionment—not to speak of school-prayer cases and those concerning aid to parochial schools, are heading toward obsolescence, and in large measure abandonment.” Alexander M. Bickel, The Supreme Court and the Idea of Progress (New York: Harper and Row, 1978), 173. Though Warren’s decisions would be narrowed and constrained in the coming decades, there never was an anti-Warren revolution on the Court.
Lastly, and most importantly, Warren is judged to be great because he made the United States more just. Titles about Warren and the Warren Court such as *Justice for All: Earl Warren and the Nation He Made*, *The Warren Court and the Pursuit of Justice*, and *Earl Warren: Justice for All*, give a sense of how Warren is viewed by many of his admirers. Morton Horowitz gives a typical summary of the accomplishments of the Warren Court, many of which would have been unlikely or impossible without the leadership of Earl Warren: “The range of the Warren Court’s influence has been enormous. The Court initiated a revolution in race relations; expanded the constitutional guarantee of ‘equal protection of the laws’; dramatically expected the freedom of speech and press; overturned unequally apportioned legislative districts; accorded defendants in criminal cases massively expanded constitutional protections; and recognized for the first time a constitutional right to privacy.”

Warren is often described as having a simple, intuitive sense of justice. He would take the side of the underdog and individual rather than the state. Rather than look exclusively to doctrine or precedent for guidance, he would often ask the simple question: is it fair? If the practice in question was not, then Warren did what he could to rectify the situation. Horowitz argues that “the Warren Court was the first Supreme Court in history to champion the legal position of the underdog and outsider in American society.” Similarly, Norman W. Provizer and Joseph D. Vigil claim that “Earl Warren possessed and enduring passion for justice. He believed in equal

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opportunity for the disadvantaged in society so they could become part of the expanding economic scene.”34 They also argue that Warren was willing “to err on the side of too much justice rather than too little.”35 Whatever Warren’s faults, his defenders claim that his accomplishments in achieving justice vastly outweigh anything that can be said against him.

The Unconventional Side of Warren’s Greatness

Those impressed with Warren and his Court are drawn primarily to the results it achieved. Warren’s advocates claim that the United States was a more just and equitable place in 1969 than it was in 1953, and they are not without justification. However, many of Warren’s defenders concede, implicitly or explicitly, that Warren’s judicial style was “unconventional.” Warren disregarded many aspects of good judging which people at his time took to be important. The elevation of certain aspects of judging, such as arriving at the right answers, brought with it a corresponding demotion of other aspects, such as craftsmanship, adherence to precedent, and reliance on history and text.

There seems to be general agreement that Warren did not have a consistent theory of Constitutional interpretation and that he made no pretensions about having one. In an article that accurately predicted that Warren “will go down as one of the outstanding figures in the history of the Supreme Court,”36 Anthony Lewis writes that “Far more than most other members of the Court, [Warren] evidently felt unconfined by precedent or by a particular view of the judicial function.” He continues: “A Warren opinion, characteristically, is a morn made new-a bland, square presentation of the particular problem in that case almost as if it were unencumbered by precedents or conflicting theories, as it inevitably must be. . . Chief Justice Warren’s opinions

are difficult to analyze because they are likely to be unanalytical.” As an example, Lewis cites *Trop v. Dulles*, an opinion authored by Warren in 1958. At issue was a statute that made it possible for soldiers who desert in wartime to be divested of their citizenship. Lewis writes: “In one vague paragraph the opinion, gliding past much contrary legal history, found that deprivation of citizenship was technically ‘punishment.’ Then, although conceding that the death penalty would not have been ‘cruel,’ the opinion concluded that expatriation was so because it brought about ‘total destruction of the individual’s status in organized society’ and cost him, with the loss of citizenship, ‘the right to have rights.’” Warren goes on to assert that when “an Act of Congress conflicts with [a Constitutional provision], we have no choice but to enforce the paramount commands of the Constitution.” But, this is hardly an argument; it looks more like an assertion. In dissent, Justice Frankfurter wrote, “Is constitutional dialectic so empty of reason that it can be seriously urged that loss of citizenship is a fate worse than death?”

The view that Warren’s opinions, as well as many opinions that have been identified in retrospect as “Warren Court” opinions, are lacking in craftsmanship and legal reasoning is shared by Warren’s critics and defenders alike. Alexander Bickel, arguably the Warren Court’s most trenchant contemporary critic, wrote in 1957: “The Court's product has shown an increasing incidence of the sweeping dogmatic statement, of the formulation of results accompanied by little or no effort to support them in reason, in sum, of opinions that do not opine and of per curiam orders that quite frankly fail to build the bridge between the authorities they cite and the results they decree.” Similarly, Warren Court critic Philip B. Kurland writes that only “those

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37 Ibid., 4-5.
addicted to ‘legal technicalities’ rather than ‘legal statesmanship’” would find any real fault with
the Court’s opinions due to the great gains in justice which they effected, and argues that we
shouldn’t care too much that the opinions aren’t well written. Kurland did, however, believe that
the Court’s opinions were unsystematic: “If it is inappropriate to expect elegance from a Court
dedicated to egalitarianism, it is not unreasonable to hope for workmanlike quality. It is,
evertheless, an unfulfilled wish.”

Warren’s defenders also concede that there is something unsystematic about Warren’s
approach. After surveying the civil rights cases of the 1960-1961 term, Robert G. McCloskey
laments the lack of a systematic approach to this area of law: “Why has it done so little to
develop a reasoned, connected set of doctrines in the field of civil rights? Partly no doubt be-
cause this is easier said than done . . . But though this might account for some inadequacy in
doctrinal structure, it does not fully explain the failure to develop any such structure at all.”

In an approving passage describing Warren’s support for an anti-flag burning statute, biographer Ed
Cray wrote that “Warren had not a legal theory to sustain his opinion; that he would leave to the
clerks. He was voting instinctively, not intellectually.”

Warren is described by many of his defenders as not caring much for legal technicalities.
He would look at the controversy in the case, decide what would be fair, and then ask his clerks
to fill in the reasons. Bernard Schwartz, who, with a “judicial biography” of Warren entitled
Super Chief, cannot be mistaken for a critic, writes that “The justices who sat with him have all

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41 Philip B. Kurland, “Foreword: ‘Equal in Origin and Equal in Title to the Legislative and Executive Branches of the
42 Robert McCloskey, “Deeds Without Doctrines: Civil Rights in the 1960 Term of the Supreme Court,” American
University Press, 1983), 68-9; Cray, Chief Justice, 310.
stressed that Warren many not have been an intellectual like Frankfurter, but then, as Justice Potter Stewart puts it, ‘he never pretended to be one’ . . . according to Stewart, Warren ‘didn’t lead by his intellect and didn’t appeal to others’ intellects; that wasn’t his style.’”\textsuperscript{45} Schwartz also writes that “Warren never pretended to be a scholar interested in research and legal minutiae. These he left to his clerks,” and goes on to relate that on one occasion Warren’s clerks got a good laugh out of a “learned law review article” that put great importance on the way Warren cited precedent. “The clerks knew that was utterly foolish, because nobody (and certainly not the Chief) had paid any attention to it.”\textsuperscript{46} Former Warren clerk Gerald Gunther (who would later become a top scholar of Constitutional law) relates that Warren realized that justice Frankfurter could get virtually any outcome he wanted on the basis of some alleged legal technicality. This “turned the Chief into a great skeptic, if not a cynic, about the alleged binding nature of jurisdictional rules.” According to Gunther, Warren learned from Frankfurter that a judge could do whatever he liked, and that “it didn’t turn much on whether he had a legal basis for it.”\textsuperscript{47}

Warren and the Warren Court have been called “antihistorical” and “antidoctrinal” for the way they disregarded history and precedent to achieve ethical aims. David J. Garrow (again, a scholar sympathetic to the Warren Court) argues one of the most important lessons of \textit{Brown v. Board of Education} “is the clear and indeed almost explicit manner in which \textit{Brown} signifies and symbolizes the post-1954 Court’s repudiation of historical intent and meaningful evidence of historical intent in its reading and application of the reach and meaning of the Fourteenth Amendment.”\textsuperscript{48} In \textit{Brown}, Warren wrote that, “at best,” the history of the Fourteenth Amendment.

\textsuperscript{45} Schwartz, \textit{Super Chief}, 31
\textsuperscript{46} Ibid., 68.
\textsuperscript{47} As quoted in Cray, \textit{Chief Justice}, 310.
Amendment was “inconclusive” and that “in approaching this problem [of racial segregation in public schools], we cannot turn the clock back to 1868, when the Amendment was adopted, or even to 1896, when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.”\(^{49}\) In other words, history would not be the deciding factor, or really any factor, in the outcome of the case. For Warren the important facts were in the present, not the past. Garrow argues that the lesson of *Bolling v. Sharp*, *Brown’s* companion case, is that “the traditions and niceties of doctrine do not matter—or at the very most, matter relatively little—when and where the Court becomes convinced that a fundamental, moral holding needs to be made.”\(^{50}\) Moral concerns become central, while doctrinal and historical concerns recede to the periphery of importance. According to Garrow, this approach is continued in “the Warren Court’s two other landmark antihistorical rulings—*Baker v. Carr* and *Griswold v. Connecticut* (and to their even better known progeny, *Reynolds v. Sims* and *Roe v. Wade*).”\(^{51}\)

This language may sound extreme, but it is not unique to Garrow. G. Edward White, another Warren acolyte, shares Garrow’s view and gives an elaborate defense of Warren’s “antidoctrinal” reasoning. From the outset, White concedes that Warren did not follow the established conventions of legal reasoning of his time: “There is no gainsaying Warren’s indifference to the approved analytical reasoning of his time . . . In an age still dominated by process theory, in which judges are expected to engage in ‘reasoned elaboration,’ duly acknowledging their sources and demonstrating their capacity at analytical reasoning, Warren


\(^{50}\) Garrow, “From *Brown* to *Casey,*” 78. Emphasis in original.

\(^{51}\) *Ibid.*, 75.
style of opinion writing was offensive; many called it inept.”

White argues that it was not inept, but only unconventional. The conventions of the time placed high value on skillfully navigating the twisted jungle of case law, citing authority for every step in the reasoning, and generally deferring to precedent and history. White thinks (and it is plausible to grant) that most judicial decisions start from the conclusion and work toward the premises. Warren was unique in that he wasn’t particularly concerned with obscuring his attachment to results: “Technical proficiency therefore seems to reassure us not so much about judicial motivation but about judges’ willingness to track the conventional reasoning patterns and professional sources of their time. Warren seemed singularly uninterested in carrying out this tracking. Consider the major Warren Court opinions he wrote: Brown v. Board of Education, Reynolds v. Sims, Miranda v. Arizona. In each conventional reasoning patterns and sources leaned heavily against Warren’s position; in each he ignored them.”

In other words, whatever Warren had going for him, it was not deference to the dominant forms of legal reasoning.

If Warren wasn’t guided by precedent, history, or technical proficiency, what did guide his decision making? White’s answer: his sense of moral truth. Warren felt bound to follow the moral imperatives which he found written in the Constitution. Warren once characterized law as "float[ing] in a sea of Ethics" and said that there is a “Law beyond the Law.” White sums up Warren’s felt obligation to the text as follows: “The ethical imperatives that Warren read in the Constitution were so clear to him, and his duty to implement them so apparent, that matters of

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53 Ibid., 40.

doctrinal interpretation were made simple and matters of institutional power became nearly irrelevant."55

White’s defense of Warren’s reasoning is that Warren implicitly “expanded the scope of his sources for each decision.”56 For example, in Brown v. Board, White argues that Warren added a new principle to the law – the “antidiscrimination principle.” Though this principle already had some currency within the law, Warren gave it a new place and new relevance. The principle was not narrowly tied to precedent and history, as others might have believed. According to White, “His principles in Brown were philosophical, political, and intuitive, not legal in the conventional technical sense.”57 Drawing on this principle, the controversy in Brown was simple – racial segregation was clearly discrimination, and therefore it was unconstitutional. Other legal questions, such as the apportionment of voting power, were also made simple by similar lines of reasoning. White also argues that there is nothing wrong with results-oriented judging: “The first step in the case for Warren’s influence [or greatness] is to attack the conventional platitude that result-oriented judging is to be condemned.” Shouldn’t we want the law to reach just results? Shouldn’t we use whatever reasons we can within the law in order to achieve justice? For Warren, “convictions controlled the technical details; details never controlled convictions . . . what counted in decision making was the conviction that the result was right.”58

In short, White concedes that Warren may have reasoned “poorly” according to the prevailing standards of legal reasoning in the 1950’s, but why should those standards have any special claim on us? “Because Warren's justifications for a result were often conclusory

55 Ibid., 462.
57 Ibid., 42.
58 Ibid., 47.
statements of what he perceived to be ethical imperatives, his reasoning as a jurist was regularly opaque. But opaque or unconventional reasoning is not the same as no reasoning. It merely invites one to analyze Warren’s jurisprudence at a different level.”59 The level at which White would have us analyze Warren’s jurisprudence is the level of just results – Warren expanded the sources of Constitutional law by focusing on the ethical imperatives of the Constitution and applying those principles to actual cases. In doing this, Warren was not particular about the reasons he used – he would adopt whatever reasons seemed most likely to persuade his colleagues and to entrench his moral views in the law. The result was what mattered, not the road by which one got there. A judge should be committed to justice, not process narrowly conceived.

If this portrayal of Warren is accurate, then we can infer two things about Warren’s judicial style: he wasn’t particularly concerned with legal technicalities, and he didn’t try to pretend that he was. In the Warren Court era, it became acceptable and laudable to get the right results regardless (or almost regardless) of the prior state of the law. Or, put more positively, doing justice became preeminent among the values that justices were supposed to instantiate in their decisions. Where Warren thought he could legitimately do the right thing, he did it, and did not concern himself with the legal minutia that could get in the way of justice. Warren made results-driven judging respectable (and controversial) in a way that it had not been previously.

I hasten to add that much, probably most, of legal reasoning prior to Warren and the Warren Court was also results-driven. A certain degree of results-driven reasoning is unavoidable when a justice must persuade at least four other justices to join his or her opinion. The opinion that is eventually handed down by the Court often only has the virtue of being what a sufficient number of justices are willing to sign on to. Further, clever justices can go to great

lengths to hide the fact that they are judging in a results-driven manner. Recall the anecdote from Gerald Gunther quoted above, that Warren realized Frankfurter could manipulate the law to get any result he wanted. It might have looked like Frankfurter was following the law, but in fact he was just bending the law to his purposes (or so Warren came to believe, according to Gunther). It may be that there are no uniquely right answers to many legal questions, but the justices often write as if the answer they reach is the necessary conclusion of prior law. With the Warren Court there seemed to be less of an attempt to keep up this charade. Warren didn’t “pretend” to be a legal scholar, and Warren Court is not praised because its opinions appeal to a legal-process mindset. Rather, the Warren Court is praised because of its results, because it left the law more just than it found it.

Before concluding this section it must be noted that White is not the only scholar who believes that the reasoning of the Warren Court was not poor. After an intensive study of the Warren Court and its critics, Thomas Keck claims that “The problem was not that [Warren] Court’s opinions were poorly reasoned, but that they were based on reasons which the scholarly critics rejected.” Keck argues that Frankfurter and others who advocated a more restrained approach accepted a different set of premises about American democracy – that the process by which political decisions are made is basically fair, or at least fairer than having judges make the decisions. Warren and his allies on the Court rejected this view. However, beyond than noting the differences in the fundamental assumptions of the justices, Keck does not do much to redeem the reasoning of the Warren Court.

Perhaps the most ambitious attempt to rescue the reasoning of the Warren Court from a legal perspective is found in David Strauss’s paper, “The Common Law Genius of the Warren

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60 Thomas M. Keck, The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism (Chicago: University of Chicago Press, 2004), 64.
Court.” Strauss begins by noting, as I have noted, that Warren Court’s critics and defenders alike think it was essentially “lawless,” disregarding legal conventions and the text of the Constitution in order to achieve its aims. Strauss concedes that “the Warren Court did things, in the name of the Constitution, that the text of the Constitution does not compel and that conflict with the understandings of those who drafted and ratified the Constitution.” However, Strauss thinks that “the text and the original understandings are not the only sources of law, or even the most important sources of law, including constitutional law.” Strauss’ defense is that the Warren Court was not lawless because it followed the essential aims and premises of a common-law court. According to Strauss, premises of the common law include: “humility about . . . individual human reason” (thus the need to rely on the wisdom of others, including previous cases), “a rough kind of empiricism” (i.e., with an eye toward what works), and “innovation . . . interpreting precedents in a way that candidly promotes good results.” The common law relies on the past but is not wholly beholden to it. It gleans the best from what has been decided before and cautiously (but confidently) walks in the direction of progress. The common law is committed to what was once called “right reason,” or the best outcome for the case at hand.

Judged by these standards, Strauss believes that the Warren Court was an exemplary common-law court in some of its most important decisions: Brown v. Board, Gideon v. Wainwright, Miranda v. Arizona, and The Reapportionment Cases.

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62 Ibid., 849.
63 Ibid., 850.
64 Ibid., 857.
65 Ibid., 858.
66 Ibid.
67 Ibid.
Strauss may be right that the Warren Court was a good common-law court, but Strauss’ concessions and framing assumptions resolve the questions about the Warren Court’s reasoning before they can be asked. If one doesn’t think the text of the Constitution has any special priority in Constitutional reasoning, then the Warren Court’s reasoning is fine. But, of course, the entire controversy is over whether the text should have priority. Strauss’ rescue of the Warren Court’s reasoning only invites us to think more precisely about what good constitutional reasoning consists in.

In large part, the problem Strauss points to is a permanent feature of the American legal system, a hybrid which combines common-law courts with a written document (the Constitution) that, at times, reads very much like a statute. The tension between the statutory and common-law elements of American law is unavoidable, and leads to interminable debates about which aspects of the law and legal process should be favored in which circumstances, and why. Phillip Bobbitt is correct to point out that there are several “legitimate” modalities of constitutional reasoning, and that these do not necessarily point toward the same conclusion in all (or even many) cases.⁶⁸ If Warren’s reasoning is good, it is good from the perspective a particular understanding of the aims and standards of constitutional reasoning.

Evolving Standards of Rationality

Momentarily we will turn to the implications of Warren’s style for our evaluations of judicial excellence, but first it is worth noting the path-dependent ways in which the Warren revolution did not change the general product of the Court. As White notes above, the “process theory” of judging holds that judges should engage in “reasoned elaboration,” carefully citing sources and making the law coherent through the construction of systematic doctrine which

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could be applied by future and lower courts. This picture of the judicial function had wide currency in Warren’s day and is still influential in how many judges and lawyers think about the job of a judge. The standard view of Warren (which, whether true or not, continues to be accepted by most people) is that he used whatever reasons he could to get his moral views into the law; he wasn’t particularly concerned with “pretending” that his conclusions necessarily followed from the standard sources of Constitutional law. Even his defenders could see that the reasons he gave were convenient rather than controlling. “Systemization” was not his strength.

However, “reasoned elaboration” was too strongly entrenched in the practice of law to be dislodged by one justice or one Court. The precedents laid down by Court were quickly taken up and appropriated into new bodies of doctrine for many areas of the law. The Court’s doctrine with respect to the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments all underwent significant and sometimes sweeping changes. The Equal Protection clause of the Fourteenth Amendment, in particular, became home to a vast body of doctrine which would control large areas of the law. “Separate but equal” treatment for different races, an approach which the Supreme Court had condoned in the past, was deemed “inherently unequal” in public education, and therefore unconstitutional. Unequal electoral districts, a longstanding reality of American democracy, were deemed unconstitutional: “The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth,

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70 Plessy v. Ferguson, 163 U.S. 537 (1896).

and Nineteenth Amendments can mean only one thing -- one person, one vote." The Equal Protection clause would yield “fundamental” rights to marry, vote, and travel during the Warren years. It is worth noting that in 1927 Justice Oliver Wendell Holmes, Jr., could accurately say that the Equal Protection clause was the “usual last resort of constitutional arguments." The Warren Court moved equality from the periphery to the core of constitutional deliberation and decision-making.

The broader doctrinal development which occurred under Warren’s tenure was the creation of the “tiers of scrutiny” jurisprudence which would come frame the Court’s approach civil rights and inequality. What does this jurisprudence consist in? By the end of the Warren Court there were two levels, or tiers, of scrutiny that could be applied to law (a third tier would be added later): for “ordinary economic legislation,” as well as other kinds of legislation, the Court would apply a very deferential standard known as the “rational basis test.” To pass this test a law merely needed to have a legitimate end (defined very broadly) and use means which were reasonably adapted to the accomplishment of that end. The state didn’t even need to prove that the law passed these tests; it was enough that the Court could imagine a set of circumstances under which the law could be justified. In *Williamson v. Lee Optical*, decided in 1955, the Court upheld an Oklahoma law that prohibited anyone but a licensed ophthalmologist or optometrist from installing (or authorizing the installation of) lenses in the frames of eyeglasses. The Court conceded that “the Oklahoma law may exact a needless, wasteful requirement in many cases,” presumably because people without an advanced medical degree could install lenses in frames as

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well as a doctor could, but defended the law as conceivably reasonable. After imagining various justifications which the legislature could have had in creating the law, the Court stated that “the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”\textsuperscript{77} The Court went even further in \textit{McGowan v. Maryland},\textsuperscript{78} an opinion authored by Chief Justice Warren in 1965. Here the Court upheld a Sunday closing law because, conceivably, it could have a secular purpose:

> The Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

The other tier of scrutiny that began to take a distinctive shape during the Warren Court years is “strict scrutiny,” and was applied 1) when a state action impinges on a “fundamental” right or interest, or 2) when laws rest on a “suspect classification;” that is, they seem to be prejudicially directed toward “discrete and insular” minorities. When either of these conditions obtain, the government must prove that the law is directed toward a \textit{compelling state interest} and that the means chosen by the law are \textit{narrowly tailored} to the accomplishment of that end. The means chosen must be the least restrictive ones available; if other means could be chosen which


would impinge less on the fundamental right or involve less use of a suspect classification, those means must be preferred.\textsuperscript{79}

It is difficult to say with precision when the two-tier system came into being. Something like the deferential rational basis standard had been advocated for quite some time, perhaps most recognizably by Justice Oliver Wendell Holmes, Jr. The genesis of the idea that certain kinds of laws would need to meet a higher justificatory standard is usually located in \textit{U.S. v. Carolene Products}, decided in 1938.\textsuperscript{80} In footnote four (the most famous footnote in the history of constitutional law), the Court writes that “There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.” It goes on to say that legislation which “restricts . . . political processes” or which targets, prejudicially, “discrete and insular minorities,”\textsuperscript{81} would need to meet a higher burden of justification. \textit{Skinner v. Oklahoma}, decided in 1942, introduced the phrase “strict scrutiny” into the constitutional lexicon. The Court wrote that “strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.”\textsuperscript{82}

\textsuperscript{79} In passing we may note that to a cynic, the tiers of scrutiny jurisprudence seems like a convenient way for justices to get their preferred results. The Constitution does not say which rights are “fundamental,” and thus deserve strict scrutiny, and which ones are merely “economic,” and thus merit only rational basis scrutiny. Only a judicial determination about which aspects of social life and individual well-being are most important can determine which rights get special treatment.

\textsuperscript{80} However, the notion that any infringement of a “fundamental” right would need a strong justification seems implicit in the very concept of fundamentality.

\textsuperscript{81} \textit{U.S. v. Carolene Products}, 304 U.S. 144 (1938).

Korematsu v. United States, decided in 1945, ruled that “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect.”

Though there were hints of the tiers of scrutiny jurisprudence prior to the Warren Court, these innovations had not yet been synthesized into a settled doctrinal structure. In addition to the innovations in the rational basis test cited above, the Warren Court also helped define strict scrutiny. In Sherbert v. Verner, decided in 1963, stated that the government needed to show a “compelling state interest” when it burdened the exercise of religion, which was considered a fundamental right. This language would become standard in later strict scrutiny analysis. In 1967 the distinction between strict scrutiny and rational basis review was fairly clear when the Court declared marriage a fundamental right and struck down Virginia’s miscegenation law in Loving v. Virginia:

At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the "most rigid scrutiny,"

Korematsu v. United States (1944), and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate . . . There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification.

Though coalescing, the notion that there were two tiers of review was still somewhat imprecise. In 1966 Justice John Marshall Harlan (II) could still claim that there were not two

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standards of review\textsuperscript{86} (of course, that he felt the need to deny the two-standards approach shows that it was visible enough to merit attention). However, the year before Warren’s retirement the pattern was clear enough to the \textit{Harvard Law Review} that it could run a lengthy article detailing the intricacies of the different standards of review.\textsuperscript{87} Tiers of scrutiny had arrived, and it was miles beyond anything that could have been anticipated in 1953.

\textbf{Judging After Warren}

In this paper I have been arguing that Warren changed the standards by which judicial greatness is measured. What would count as evidence for this claim? One kind of evidence, which I have tried to provide, is the way that Warren’s style led to a change in the relative weights assigned to different aspects of judicial performance by observers of the Court. As White puts it, “Warren’s elevation of practical politics and morality to major components in the Court’s decision making downgraded the significance of technical reasoning in the process of reaching decisions.”\textsuperscript{88} Prior to Warren, practical politics and morality played some role in the decision-making of Supreme Court justices, but Warren made these concerns more central.

Another kind of evidence is the way that Warren’s example changed the terms and categories that people use to describe and evaluate the activity of the justices. Richard Posner argues that “the test of greatness for the substance of judicial decisions, therefore, should be, as in the case of science, the contribution that the decisions make to the development of legal rules and principles rather than whether the decision is a ‘classic’ having the permanence and perfection of a work of art.”\textsuperscript{89} Warren clearly qualifies as great on this standard, due the great

\textsuperscript{86} Katzenbach v. Morgan, 384 U.S. 641 (1966), Harlan, J., dissenting.


\textsuperscript{88} White, “Earl Warren’s Influence,” 44.

influence he and his Court had on so many areas of the law. However, beyond doctrinal changes, Warren’s example changed the terms people use to make sense of constitutional interpretation and the role of the justices. The warring interpretive schools of “living constitutionalism” and “originalism” grew directly out of the Warren Court years, as well as a general concern with “judicial activism.” Though this framing of the judicial and interpretive options has come to seem natural to many observers of constitutional law, it is by no means necessary. Prior to the Warren Court, one could draw on sources other than the Constitutional text and history without being thought a “living constitutionalist” or an “activist.” Barry Friedman has shown that concerns over judicial activism only become salient due to a particular confluence of beliefs on the part of the public and actions on the part of the Court.90

Some of the justices who sat with Warren resist the labels of “originalist” or “living constitutionalist,” and their self-understandings manifest a set of alternatives which was not dominated by these labels. Justice Felix Frankfurter, for example, does not fit easily into either camp. He was clearly no originalist since, among other things, he was willing to use the Due Process clause of the Fourteenth Amendment to strike down police procedures which “shock[] the conscience.”91 One may want to call Frankfurter “living constitutionalist” in a very watered-down sense, but his overall commitment to judicial restraint makes the label seem very inappropriate. Frankfurter agonized over his decisions and would only strike down a law with great reticence (indeed, in Brown he was genuinely concerned that the Fourteenth Amendment

90 Barry Friedman, “The Birth of an Academic Obsession: The History of the Counter-Majoritarian Difficulty, Part Five,” Yale Law Journal 112 (2002): 153-259. Friedman argues that “countermajoritarian criticism will emerge when: (1) there is general acceptance of judicial supremacy; (2) there is a sense that constitutional meaning is relatively indeterminate, so that judges have broad discretion; (3) notions of popular democracy are prevalent; and (4) courts are rendering decisions that actually are contrary to the preference of a portion of the public large enough to deem itself the majority.” (168) Friedman argues that the academic debate over judicial review can be traced back to 1943 (184), but that this debate was one of many and did not become central for academics and the public until the Warren years. 91 Rochin v. California, 342 U.S. 165 (1952).
did not prohibit racial segregation\(^\text{92}\). But, Frankfurter would never say that the text of the Constitution, understood as the founders understood it, was the only thing which authorized him to strike down acts of the legislature. The relevant law for Frankfurter was much broader than the text of the Constitution, and it was his herculean effort to understand and apply it as a whole.

Justice Harlan, too, was neither a living constitutionalist nor an originalist. Like Frankfurter, he was generally inclined toward restraint, but not on the basis of the text alone. In *Poe v. Ulman*, a precursor to *Griswold v. Connecticut*, Harlan voted to strike down a contraceptives ban on the basis of a broad reading of the Due Process clause of the 14\(^{th}\) Amendment: “it is not the particular enumeration of rights in the first eight Amendments which spells out the reach of Fourteenth Amendment due process, but rather, as was suggested in another context long before the adoption of that Amendment, those concepts which are considered to embrace those rights "which are . . . fundamental; which belong . . . to the citizens of all free governments," . . . for "the purposes [of securing] which men enter into society."\(^\text{93}\) Harlan believed that judges could use a broad understanding of some guarantees of the Constitution to combat manifestly irrational legislation, but he was much more committed to tradition and history than many of his brethren on the Court. Harlan was no doctrinaire originalist, but he found plenty to disagree with when it came to some of the Warren Court’s most memorable contributions: between 1962 and 1968 (the heyday of the Warren Court) he wrote an average of 31.1 dissents per term, far more than any other justice on the Court.\(^\text{94}\)

After Warren’s tenure the interpretive options would appear differently. Warren’s contributions were judged by many to be so right, so self-evidently true, that their source or

\(^{92}\) Schwartz, *Super Chief*, 77.


\(^{94}\) See chart in Keck, *The Most Activist Supreme Court in History*, 70. The second most dissenting justice was Stewart, with an average of 24.1; Black came in third with 21.0.
justification within the Constitutional text seemed of merely secondary interest. Warren had to be right, because he had come to the right conclusions.

Warren’s critics, on the other hand, were not convinced and sought to define their judicial approach in a way which would maximize Warren’s alleged “lawlessness.” Frankfurter and Harlan’s approaches were useful in some respects, but their judicial philosophy didn’t seem tied to anything firm and unsubjective. Therefore, their theories of judicial restraint did not serve the purpose of highlighting the unconstrained nature of Warren’s style. Moving forward, theorists and judges who defined themselves against the example and record of the Warren Court would justify their jurisprudence on the basis of the text, history, and (to some extent) traditions of Constitutional law and practice. Text and history seemed like sources which were firm, objective, and uncontroversial; these sources provide a reference point outside of the judge which can be used to hold him or her accountable. Justice William H. Rehnquist, who joined the Court just two years after Warren stepped down, spent much of his career developing this critique;[95] and Justice Antonin Scalia has taken it even further.[96] But, it is worth remembering that the interpretive options need not appear in such sharp contrast – prior to Warren, one did not have to choose between an “unconstrained” approach in favor of moral rights and an approach that was wholly beholden to text and history. Only in response to a particular confluence of political and legal factors does such a choice appear unavoidable.

And herein lies the strange legacy of Chief Justice Earl Warren. He is remembered primarily for extending rights to the weak, the disenfranchised, and the oppressed, but even his admirers are not entirely certain the Constitution authorized him to do so. After Warren, the

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[95] See Keck, The Most Activist Supreme Court, 123-133.
justices were still expected to give reasons, but the reasoning took on a new character: results-driven jurisprudence became both respectable and reprehensible in a way that it had not been previously. Speaking for those who admire Warren, Schwartz says it best: “Perhaps the Brown opinion did not articulate in as erudite a manner as it should have the juristic bases of its decision. But the Warren opinion in that case is so plainly right in its conclusion that segregation denies equality, that one wonders whether learned labor in spelling out the obvious was really necessary.” The necessity of giving good reasons seemed to decline when the results were manifestly just. On the other side, Justice Harlan gave voice to the concern that the Warren Court’s approach was unconstrained and dangerous: “these decisions [specifically, electoral reapportionment] give support to a current mistaken view of the Constitution and the constitutional function of this Court. This view, in a nutshell, is that every major social ill in this country can find its cure in some constitutional principle and that this court should take the lead in promoting reform when other branches of government fail to act. The Constitution is not a panacea for every blot upon the public welfare nor should this court, ordained as a judicial body, be thought of as a general haven of reform movements.” The Warren Court’s decisions and approach are largely responsible for the divide between living constitutionalism and originalism which structure the interpretive debate today.

Conclusion

Chief Justice Warren, of course, is not solely responsible for the Court who bears his name, nor for the actions of the supporters and critics he would inspire. However, it is generally agreed that the “Warren revolution” could not have occurred without Warren. In response to a question about whether Justice Black was the intellectual leader of the Warren Court, Justice

Potter Stewart responded that “if Black was the intellectual leader, Warren was the leader.”

Warren was the once-in-a-century justice who had the courage, confidence, and conviction to instigate a genuine revolution within a branch of government. Warren did not set the standard which all justices have to live up to in order to be considered “great,” but he did create a new genre of greatness: call it “rights-protecting egalitarianism.” Those who follow Warren may revere or despise him, but none can ignore him. After Earl Warren the judicial function, constitutional interpretation, and the evaluation of judicial performance would never be the same.

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